Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 557

HARRY A. LORD, ROY DIAL, BERTHA H. DIAL, ET AL.,

Appellants,

vs.

A. H. HENDERSON, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

STATEMENT AS TO JURISDICTION

WARREN E. LIBBY,
Counsel for Appellants.

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Civil Nos. 17237-17240

No. 17237

HARRY A. LORD, *Plaintiff and Appellant,*

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

No. 17238

HARRY A. LORD, *Plaintiff and Appellant,*

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

No. 17239

ROY DIAL, et al., *Plaintiffs and Appellants,*

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

No. 17240

UTILITY TRAILER SALES COMPANY, a corporation et al., *Plaintiffs and Appellants,*

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their Statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment and decision of the District Court of Appeal of the State of California entered in all four of the above-entitled causes.

Opinion Below

The Opinion containing said judgment and decision of the District Court of Appeal of the State of California, Second Appellate District, Division One, is reported in 105 Adv. Calif. App. 535, and certain modifications made to that Opinion by the said Court on denial of rehearing are printed in 106 Adv. Cal. App. 6. Said Opinion, including the modifications thereto, indicated by striking portions of the original text as ordered and inserting the new language in italics, is attached hereto as Appendix A.

Nature of the Case

Each of these cases is an action to enjoin enforcement, as to plaintiffs, of that certain statute of the State of California known as the Caravan Act, (Ch. 788 of the Stat. of 1937, p 2253) upon the ground that the same is repugnant to the Commerce Clause of the United States Constitution, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment thereto.

The Statute Concerned

Briefly stated, the said Caravan Act of 1937, requires payment of a Fifteen Dollar flat tax for the transportation of a vehicle on its own wheels for the purpose of sale, save and except when said vehicle is so operated solely within either of two arbitrarily formed "zones" into which the State is divided. Although funds so collected were not allocated for any particular use, the statute recites a legislative declaration that $7.50 of the tax is imposed for the privilege of using the highways of the State, and $7.50 as reimbursement for regulatory expense. The statute as amended is to be found in full in Appendix B hereto.

Statement of the Case

The plaintiff, Harry A. Lord, is a transporter of new cars for other persons by drive-away method from Detroit, Michigan and Indiana points to Los Angeles, California, under the jurisdiction of the Interstate Commerce Commission. This operation was commenced as a contract-carrier operation and later interpreted by the Interstate Commerce Commission to be of a common-carrier status. Mr. Lord operates such transportation principally in convoys of from fifteen to thirty cars each, of which approximately ninety per cent are coupled in hookups of two cars each, the motive power being furnished by the lead automobile.

Plaintiff Lord commenced Action on Appeal No. 17237, on July 19, 1937 and thereafter obtained a preliminary injunction in said action enjoining enforcement of the Caravan Act as to himself. On September 17, 1937, counsel for the respective parties entered into a stipulation for deposit of the amount of the Caravan Tax fees collected and to be collected from plaintiff Lord in a special fund in the hands of the Director of Motor Vehicles, the same to be held in a special fund as and in lieu of a bond for said preliminary injunction. The trial court approved said stipulation and reserved jurisdiction to make further appropriate orders in respect of said fund upon final determination of the constitutionality of the said statute. By the terms of both stipulation and order the fund was to be paid to Lord if the statute was found to be unconstitutional, and if found to be constitutional was to be paid to the Motor Vehicle Department. This action was later dismissed without trial on the merits and without disposition of the moneys held in said special fund. (*Lord* v. *Ingels*, 64 Cal. App. 2d 559.)

Thereafter and in February 1943, plaintiff Lord com-

menced a new action upon the same grounds (complaint held good in *Lord* v. *Garland*, 27 Cal. 2d 840 attached hereto as Appendix C.) the same being that finally tried on the merits, and appearing as No. 17238 on appeal.

Thereafter, in *Lord* v. *Superior Court*, 27 Cal. 2d 855, plaintiff Lord was denied a writ of prohibition against the trial court to prevent disposition of the special fund pending final determination of the issue of constitutionality in his later action, but the said fund, in the approximate amount of $86,177.50 was and is still retained awaiting a final decision as to the constitutionality of the Act. (*Lord* v. *Superior Court*, 27 Cal. 2d 855, Appendix D. hereto.)

Plaintiff Dial commenced Action No. 17237 (on appeal) in July, 1947 and asserted the same objections to the Caravan Act as theretofore raised by plaintiff Lord. The Roy Dial Company, a partnership, is a used car dealer with its principal place of business in Long Beach, California. It transports automobiles, within the purview of the Caravan Act, from Chicago, Illinois and Arizona points to Long Beach, substantially all in single car operations not traveling in convoy, caravan, or hookups.

The Utility Trailer Sales Company, the Utility Trailer Sales Company of San Francisco, Inc., and Utility Trailer Sales Company of Fresno, Inc., each of them corporations, commenced their action (No. 17240 on appeal) in January, 1948 and likewise urged identical objections to the Caravan Act. All of these corporations are sales companies, taking delivery of the product of Utility Trailer Manufacturing Company at Los Angeles, California and selling the same in California, Arizona and Nevada. Each corporation transports its product (truck-trailers or vans) on their own wheels in tow of another vehicle to their respective points of sale, and are therefore compelled to pay the tax in question whenever crossing the zone line or state line.

Consolidation of the Actions

All of these cases were, by motion, consolidated for trial and heard upon the same evidence. In each case judgment was entered for the plaintiffs with an order in Action No. 17237 to distribute the special fund to plaintiff Lord, and appeal from all of said judgments and the said special order taken by defendants to the District Court of Appeal on a single transcript; there docketed and argued as one case, and disposed of by a single written opinion. Under the authority of First National Bank of *Shreveport Louisiana, et al.*, v. *Louisiana Tax Commission*, et al., 289 U.S. 677, plaintiffs prosecute this single appeal in all cases from the judgment and decision of the said District Court of Appeal.

The Questions Presented

The questions presented by these cases, as more specifically set forth in the Assignment of Errors filed herewith, are as follows:

1. Is the Caravan Act of 1937 repugnant to the Commerce Clause of the United States Constitution Article 1, Section 8, as applied to these plaintiffs, or any of them, upon any one or more of the following grounds:

(a) In that the said Caravan Act, in practical effect if not formally, discriminates against interstate traffic in vehicles being transported for sale, as against similar traffic of an entirely intrastate character.

(b) In that the said Caravan Act, by imposing a tax upon the transportation of vehicles, the owner of which intends to sell the same, while not imposing a tax upon the transportation of other vehicles, the owners of which do not intend to sell the same, establishes a classification so totally arbitrary, fanciful and unreasonable as to bear no relation whatsoever to any legitimate purpose concerned with the use of, or regulation of vehicles upon, the highways.

(c) In that the said Caravan Act, by imposing a flat tax of $15 for the transportation of each vehicle within its purview, requires the payment of a sum which, irrespective of other objections, is in excess of any compensation which the State may exact.

2. Is the Caravan Act of 1937 repugnant to the first section of the Fourteenth Amendment to the Constitution of the United States as to these plaintiffs or any of them upon the ground that the classification by which the tax involved is levied upon them and not upon others is so entirely arbitrary, fanciful and unreasonable as to, in effect, deprive them of their property without due process of law.

3. Is the Caravan Act of 1937 repugnant to the first section of the Fourteenth Amendment to the Constitution of the United States upon the ground that the classification by reason of which the tax involved is levied upon them and not upon others is so entirely arbitrary, fanciful and unreasonable as to, in effect, deny to them equal protection of the law.

Manner in Which Questions Raised

The mode of operation of each of the plaintiffs, as above briefly summarized in Statement of the Case, was set forth in great factual detail in the respective Complaints filed in each action. There followed, in each respective complaint, a detailed statement of the particular grounds upon which it was urged that the Caravan Act was, and should be held, unconstitutional: Clerk's Transcript Action No. 17237, pages 8-13; Clerk's Transcript Action No. 17238, pages 9-14; Clerk's Transcript Action No. 17239, pages 7-14; Clerk's Transcript Action 17240, pages 7-15. These allegations were substantially identical in each case and, so far as they concern the Constitution of the United States, are copied and set forth in Appendix E. attached hereto.

Each of the cases including Action No. 17237 as to the

disposition of the special fund held therein was consolidated with the others and proceeded to trial upon the basis of these pleadings. At the conclusion of seven weeks of trial and the presentation of comprehensive evidence covering every phase of the traffic concerned, the burden on the highways, regulatory measures pursued by the State, time and expense of issuing permits and policing and all expense entailed therewith, as disclosed by the Motor Vehicle Department records, the trial court rendered a memorandum decision (Clerk's Transcript in trial court Action No. 483,633, pages 102 to 123), hereunto attached as Appendix F, holding in favor of plaintiffs and each of them, upon every issue of fact and law raised by the pleadings. There then followed in the actions thus tried, detailed and specific findings of fact elaborating with particular detail, upon every phase of the matter as previously summarized in the said Memorandum Decision. These findings are contained in the Clerk's Transcript in the various cases as follows: In *Lord* v. *Henderson*, No. 17238, pages 44-80 inclusive; *Dial* v. *Henderson*, No. 17239, pages 30-59 inclusive; and *Utility Trailer Sales Company* v. *Henderson*, No. 17240, pages 23 to 50 inclusive.

Judgment in each action having been entered for plaintiffs in accordance with the aforesaid findings of fact and the conclusions of law necessarily following thereupon, defendants appealed, in each case, to the District Court of Appeal of the State of California. The same federal questions, above summarized, and as set forth in said pleadings, were again presented in the briefs of counsel for the respective parties. That these federal constitutional questions were at issue, and were so considered and decided by the District Court of Appeal of the State of California affirmatively appears from the decision of said Court attached hereto as Appendix A.

Final Judgment of the Highest Court

A judgment of the District Court of Appeal of the State of California becomes final upon the expiration of thirty days after the same shall have been pronounced. The Supreme Court of the State of California has power to order any cause pending before a District Court of Appeal to be heard and determined by the Supreme Court of the State of California at any time before the expiration of thirty days after the judgment of the District Court of Appeal shall have become final. *Constitution of the State of California*, Article VI, Section 4 (c).

In the pending cause the judgment and the decision of the District Court of Appeal was filed and entered on July 16, 1951. A petition for rehearing in that court was presented to it within the time allowed by law (Rule 27(b) Jud. Council, Rules on Appeal; Calif. Code of Civil Procedure 961) to wit, on July 31, 1951. Said petition for rehearing was denied by the District Court of Appeal on August 15, 1951. Thereafter, a petition for rehearing in the Supreme Court of the State of California was filed therein within the time allowed by law, (Rule 28(b) Jud. Council, Rules on Appeal; Calif. Code of Civil Procedure 961) to wit, on August 25, 1951. Said petition for hearing in the Supreme Court of the State of California was denied by that Court on September 13, 1951, two Justices voting for hearing (37 Adv. Cal. fol. page 761).

Jurisdiction to Hear Appeal

The jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and decision of the District Court of Appeal of the State of California is conferred by Title 28 U.S.C.A., Section 1257 (2) F.C.A. Title 28, Section 1257 (2). The following decisions, involving instances wherein the highest court of a state

has declared the validity of a state statute imposing a tax upon motor vehicles against the objections that the same is repugnant to the Constitution of the United States, sustain the jurisdiction of the Supreme Court of the United States to review the judgment and decision upon direct appeal under the above cited authorities:

Interstate Transit, Inc. v. *Lindsey*, 283 U. S. 183, 75 L. ed. 953 (1931);
Hicklin v. *Coney*, 290 U. S. 169, 78 L. ed. 247 (1933);
Aero Mayflower Transit Co. v. *Georgia Pub. Service Comm.*, 295 U. S. 285, 79 L. ed. 1439 (1935);
Dixie Ohio Express Co. v. *State Revenue Comm.*, 306 U. S. 72, 83 L. ed. 495 (1939);
Central Greyhound Lines v. *Mealey*, 334 U. S. 653, 92 L. ed. 1633 (1948);
Capitol Greyhound Lines v. *Brice*, 339 U. S. 542, 94 L. ed. 1053 (1949).

The Questions Are Substantial

The issues involved in this appeal are of importance to all transporters of motor vehicles on their own wheels, to all used car dealers, and to motor car dealers, manufacturers, and assembly plants in and outside of California. The tax here involved affects directly the cost of all motor vehicles brought in to California by this method for resale and affects directly the cost of all motor vehicles transported by this method to points outside of California in competition with similar vehicles manufactured elsewhere. The legislative act here attacked with the tax imposed by it affects a whole major industry. It also is a question of national importance because this tax is one of those state barriers which amounts to a tariff assessed by states on interstate traffic.

The California Caravan Act of 1935 (Statutes 1935, page

1453, Chapter 402), was held unconstitutional because it assessed an excessive fee, in the case of *Ingels* v. *Morf*, 300 U. S. 290. The present Caravan Act of 1937 enacted subsequently utilized some of the reasoning in *Morf* v. *Bingaman*, 298 U. S. 407 holding constitutional a New Mexico statute of similar import, by dividing a gross fee of $15 into two halves, $7.50 assessed for the use of the highways and $7.50 assessed for policing the caravaned vehicles; and by establishing two zones in California between which the tax is assessed to avoid having it exclusively a tax on interstate commerce. (App. A. Sections 4 and 8).

1. This 1937 Act was held not to violate the provisions of the United States Constitution in *Clark* v. *Paul Gray*, 306 U. S. 582, because the plaintiffs "offered no proof that either of the fees were too large, although the burden rested upon them to show that the fees were excessive for the declared purposes." (306 U. S. 599). This decision does not control in the present case because (1) the plaintiffs here proved the fees excessive, (2) they proved the facts to be the opposite to what was stipulated in the *Clark* case, (3) they proved two facts recited in the Opinion as essential to the conclusion reached in that decision and included in the stipulated facts, to be nonexistent, and (4) an operation of single cars which physically give no reason or basis for levying the tax, is included in this case which question was specifically excluded from the *Clark* decision by this language (306 U. S. page 595): "It does not appear, nor is it contended, that this appellee transports any cars singly." The best argument and evidence that the plaintiffs proved these things is the Memorandum Opinion of the trial court attached hereto as Appendix F. However, the decision of the District Court of Appeal of California for the Second District, here appealed from, ignores this evidence without reference to any analysis in the light of the record, and holds in effect that such evidence as plaintiffs

did present should not even have been admitted in evidence in a case of this kind, in this language:

> "When the question at issue is that of the constitutionality of a statute, the duty which devolves upon the trial court * * * is not to weigh the evidence before it, but to ascertain whether there are any facts in the record *or outside of it*, (emphasis is by the Court) of which it may take judicial notice, which would sustain the legislature in enacting the statute (*Clark* v. *Paul Gray*, 306 U. S. 583 (59 S. Ct. 744, 83 L. ed 10017), (App. A, p. 8, l. 24). This language was applied in its full force in the treatment of the question of the excessiveness of the tax, and no examination of the record made. The *Clark* case is not authority for such law but on the contrary, in treating of the classification made by the Act says at page 594; "Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to support a different standard. * * * Its function is only to determine whether it is possible to say that the legislative decision is without rational basis."

This last is what the plaintiffs contend they proved, especially in the case of *Dial Company* who operated only single cars and also by the fact of a single car operation excluded all basis for the levying of the tax and rendered the act unconstitutional on its face.

2. The plaintiffs in these cases have proven the facts accepted by the Supreme Court in *Clark* v. *Paul Gray*, 306 U. S. 583, as disclosed *by stipulation* and relied upon in its conclusions, to be untrue and nonexistent (if such can be said of facts). At p. 592 in the opinion, the court states: "The parties have stipulated etc." and "It further appears by stipulation etc." It does not appear clearly from the opinion in all instances as to what facts were stipulated and what were shown by testimony and evidence, but much

of the record in that case was by stipulation. Also, that case is very largely based upon *Morf* v. *Bingaman*, 298 U. S. 407, and the facts recited in that opinion are completely accepted as facts in the *Clark* case. The *Morf* case was likewise decided upon a stipulated record for the opinion states at page 410: "The facts as stipulated, establish etc.," and then goes into great detail in setting forth those facts. Thus the opinion in the *Clark* case, accepting the stipulations in that case itself, and also the stipulation in the *Morf* v. *Bingaman* case as facts likewise applying to the *Clark* case, makes out the basis for its conclusions, very largely upon stipulations. In the present case, these facts are shown by the record not to be present.

The opinion in Clark v. Gray, at page 593 states:

> "There is much evidence in the record indicating that it is the long haul traffic in cars for sale in California which tends to produce the movement in large caravans or convoys in order to save expense of transportation, and which in turn tends to impose *special burdens* on the state in connection with the use of its highways calling for the imposition of regulations and fees different from those applied to other types of motor car movement."

As applied to the single car operation of *Roy Dial*, the language cannot apply to the physical fact to give any reason for supporting either tax. Furthermore, the record disclosed that neither the Motor Vehicle Department nor the California Highway Patrol had imposed any regulations upon this type of traffic different from what the Motor Vehicle Code prescribed.

Again, at the same page 593, the court says:

> "The evidence in the present case shows that coupled cars, under control of a single driver, subject the highways to increased wear and tear because of their tendency to skid and sway on curves and in pass-

> ing other traffic, and that the length of the caravans and the inefficiency and irresponsibility of the drivers, casually employed, increase traffic congestion and the inconvenience and hazards of automobile traffic."

Examining those specifications one by one as applied to a single car operation, it is obvious that physically the specifications cannot apply to a single car operation. That these specifications are important, yes, essential, to the decision is shown by the following sentence of the court at page 593, which states:

> "These circumstances have caused the state to make increased provision for the policing of the traffic."

It is self-evident that the single car operation could not possibly have caused the state to make any increased provision for policing. Yet the opinion makes no analysis of the *Dial* operation but places it in the same category as the *Lord* operation just because Dial operates his cars on the highway for gain the same as every grocer delivery.

The court further says:

> "Without repeating what was said more at length of like traffic in *Morf* v. *Bingaman*, 298 U. S. 407, 80 L. Ed. 1245, 56 S. Ct. 756, supra,"

upon which the court equally relied, an analysis of the facts in detail as to each statement in the *Morf* v. *Bingaman* case would show likewise the impossibility of the application of its language or reasons to the single car operation. This could be done and will be done more extensively in briefs but it is felt that to extend it here more than the foregoing illustrations and these statements would unduly extend the length of this document beyond its purpose and intent.

3. Two facts recited in the opinion in *Clark* v. *Gray*, as essential to the conclusion reached, are shown by the evi-

dence in this record not to exist. At page 599, the opinion states:

> "But there is evidence that thirty-nine officers devoted part or all of their time to enforcing the 1937 Act. The expense of operating their automobiles and motorcycles is considerable;"

Mr. George E. Smith of the California Highway Patrol, a witness for the defendants, testified that in the latter part of 1936 he was placed in charge of the Oakland Bay Bridge when it was opened. He stated that about fifty patrolmen were needed to man the job in the various types of work; that this was an entirely new activity which the Highway Patrol had not theretofore performed and that at that time thirty-five or forty extra officers were added to the Patrol and given to him as freshly trained men to do this work and that he released older and trained patrolmen back to the Patrol for other work and that this was the additional force or crew added as testified by Chief Cato of the Patrol. (Rep. Trans. pp. 2661 and 2662.) Thus, the thirty-nine men assigned to caravan work with the operating expense of their automobiles and motor cycles is not even a factor to be considered in connection with this tax or in arriving at a conclusion, and cannot pertain to any of these cases as an element of expense to justify the tax.

(b) The opinion further states at page 599 that:

> "An increased burden is imposed upon the personnel of the border police stations."

As to this increased burden upon the personnel of the border police stations, this record discloses that these stations were closed in December of 1938 and have never been reopened. Thus these border stations were nonexistent at the time the *Clark* v. *Paul Gray* case was decided on April 17, 1939. They are also nonexistent so far as any

consideration being given to them or any of their burden or expense in a decision of the *Lord* case and the companion cases here.

4. A further reason why *Clark* v. *Gray* is not controlling in this case is that none of it can be applied to the single car operation of the Roy Dial Company and the levying of the tax in that instance is without any physical basis or foundation whatsoever. The consideration of such an operation was specifically excluded from the *Clark* decision by its language at page 595 stating:

> "It does not appear, nor is it contended, that this appellee transports any cars singly."

Examples of why this is so and illustrations of the inapplicability as the reasons for the tax are above set forth in paragraph 2 hereof, page 12. The District Court of Appeal in its decision did not attempt to consider this *Dial* case but chose rather to pick out its own facts applicable to the Lord operation only. So far as Dial himself is concerned no consideration is given by that opinion as to whether the tax is without any substantial basis. It is handled only upon the basis that Dial is using the highway for gain. But no more so than Yellow Cabs which are caravaned to California by Lord in his usual manner and pay no tax to be put in operation as cabs on the streets of Los Angeles and San Francisco, all as shown by this record. Thus the *Dial* case and the circumstances of that operation is an entirely new case under this statute and must be considered as such without attempting to apply to it the facts of a Lord caravan operation or the type of operations prompting the decisions in either *Clark* v. *Paul Gray* or *Morf* v. *Bingaman*.

Respectfully submitted,

WARREN E. LIBBY
Attorney for Plaintiffs-Appellants.

APPENDIX A.

OPINION OF DISTRICT COURT OF APPEAL BEING JUDGMENT APPEALED FROM. IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

Civil Nos. 17237-17240

No. 17237

HARRY A. LORD, *Plaintiff and Respondent,*

vs.

A. H. HENDERSON etc., et al., *Defendants and Appellants.*

No. 17238

HARRY A. LORD, *Plaintiff and Respondent,*

vs.

A. H. HENDERSON etc., et al., *Defendants and Appellants.*

DISTRICT COURT OF APPEAL—SECOND DISTRICT
FILED July 16, 1951

J. E. Brown, Clerk

No. 17239

ROY DIAL, et al., *plaintiffs and Respondents,*

vs.

A. H. HENDERSON etc., et al., *Defendants and Appellants.*

No. 17240

UTILITY TRAILER SALES COMPANY, a corporation et al., *Plaintiffs and Respondents,*

vs.

A. H. HENDERSON etc., et al., *Defendants and Appellants.*

APPEAL FROM A SPECIAL ORDER AND FROM JUDGMENT OF THE SUPERIOR COURT OF LOS ANGELES COUNTY, HARRY A. ARCHBALD, JUDGE.

For Appellants: Fred N. Howser, Attorney General; Frank Richards, Deputy Attorney General.

For Respondents: Warren E. Libby.

The primary question for decision, in all four of the above-entitled appeals which were consolidated for trial in the court below, is whether the Caravan Act of 1937 is constitutional under the state and federal constitutions. The constitutionality of the Act under the federal constitution has heretofore been challenged in the Supreme Court of the United States, but its constitutionality sustained in Clark v. Paul Gray, 306 U. S. 583, in an opinion by Chief Justice Stone, at that time Mr. Justice Stone. The endeavor here made to distinguish that decision which held that the Caravan Act did not violate the federal constitution is predicated upon the theory that it was based on certain facts which in the instant cases, it is alleged, were proved not to be true. It should perhaps be stated at this point that the earlier 1935 Caravan Act was held unconstitutional in Ingels v. Morf, 300 U. S. 290, solely on the ground that a license fee of $15.00 per vehicle merely for administering the Caravan Act and policing caravan traffic was excessive and hence imposed an unconstitutional burden on interstate commerce.

The Caravan Act of 1937 which materially differs from the 1935 Act [shortly stated] imposes a flat tax of $15.00 ($7.50 for the privilege of using the public highways and $7.50 as a license fee for administration and policing the

act—(a license good for a six-month period) on every motor vehicle (whether it has or has not been registered, if it be subject to registration in California) operated on its own wheels singly, in tow, or in a "caravan" or fleet, on the highway of this state, for the purpose of sale to, or purchase by, any person within or without the state, unless the operation is confined wholly within one of the two statutory zones of the state. Accordingly, any operation of the character and for the purpose mentioned, whether in a caravan or not, across a zone line within the state or the boundary line of the state makes the vehicle subject to the tax. The tax is imposed (1) for the privilege of using the highways of the state and (2) for administration and policing purposes. The funds derived from the tax are thus expressly allocated and restricted by statute.

The Act is assailed as being unconstitutional, or at least as being unconstitutional as applied to the individual respondents, on the ground (1) that it violates the commerce clause of the federal constitution (Article 1, sec. 8); (2) that it infringes the due process and equal protection clauses of the Fourteenth Amendment; (3) that it violates (a) the uniformity and the privileges and immunities clauses (Art. 1, secs. 11 and 21), and (b) the exemption and classification clauses of the state constitution (Art. IV, sec. 25, subds. 20 and 33).

Plaintiff Lord, as indicated by the above captions, instituted two actions, one in 1937 and another in 1943. Both actions challenged the validity of the Caravan Act of 1937. Lord caravans passenger motor vehicles, generally in pairs, i.e., a lead car and a car in tow—tandem style. The tandem is propelled by the lead car in which the driver sits. Usually the caravan or fleet of these tandem-hookups aggregates ten or so tandems (20 cars) plus a single pilot car for the manager of the fleet and a single follow-up car driven by a mechanic. The cars for the most part are gathered at Detroit, Chicago, and Kansas City and are then driven overland to the principal coast cities of California. The drivers are recruited through want ads in newspapers at the point from which the trek originates. These want ads offer free motor transportation to California with meals

and lodging en route together with $25.00 to $50.00 to the drivers for the services rendered.

The plaintiff Dial is a used car dealer with his principal place of business at Long Beach. As a part of his business operations he buys passenger-type automobiles in Chicago and causes them to be driven on their own wheels, with their foreign license plates, to Long Beach by drivers who are procured through ads in Chicago newspapers. Except in rare instances the automobiles are not driven in caravans or convoys. The drivers receive no pay and, what is more, are required to pay for their own lodging and meals together with the gasoline and oil used by the particular vehicles driven by them. There was evidence that such drivers took the minimum time for sleep en route.

The three plaintiff corporations Utility Trailer Sales Company (of Los Angeles), the Utility Trailer Sales Company of San Francisco, and the Utility Trailer Sales Company of Fresno are all engaged in selling the products of a manufacturer of commercial truck trailers and vans known as Utility Trailer Manufacturing Company. The sales companies all take delivery of the truck-trailers or vans at Los Angeles and then transport them on their own wheels in tow of another vehicle to their respective warehouses or sales rooms. The trailers or vans are of various sizes weighing when empty between 4,000 and 18,000 pounds. As a rule, it is not practicable to transport these trailers or vans by railroad because of their size, the cost of transportation and lack of cranes to unload them and hence they must be driven to their destination on the highways. They are not driven in caravans, except in rare instances.

The earlier Caravan Act of 1935 was intended to apply primarily to motor vehicles driven in caravans *into* the state for sale or exchange, hence the name given to the statute. The Caravan Act of 1937 applies not only to such vehicles, but to vehicles driven *intrastate* as well, unless restricted to a single zone within the state, and regardless of whether the vehicle is or is not a part of a caravan. Accordingly, the title of the present act, i.e., "Caravan Act of 1937" is something of a misnomer.

The primary object of the 1935 Act was to tax interstate

caravaning, as such, into the state of California; that is, motor vehicles driven on our highways as a part of a caravan or fleet where the objective of the owner was a sale or exchange in this state of a vehicle unregistered in California, on the theory that such a commercial use of the highways discriminated against the owners of California registered vehicles and created an undue and unnecessary congestion and hazard to traffic on the highways, and particularly to drivers of California tax registered vehicles.

In seeking to impose a tax upon motor vehicles transported upon our highways *for gain* the legislature is possessed of the constitutional power to place all such vehicles in one class and to place all vehicles not operated for gain in another class and to impose a greater tax upon the former than the latter (Dixie Ohio Express Co. v. State Revenue Com., 306 U. S. 72; Clark v. Poor, 274 U. S. 554; Morf v. Bingaman, 298 U. S. 407). It is not necessary for the legislature, to achieve such a classification, to find that there is a difference in the wear, tear and upkeep of the highways or in the hazards involved. These are proper but not requisite factors for the legislature to take into consideration and to appraise, if it sees fit to subdivide the class or create proper exceptions to it. Moreover, if it appears to the legislature that transporting motor vehicles on their own wheels creates large savings for the owners as compared with other modes of transportation, such as by rail, the saving may properly be considered in fixing the tax. (Dixie Ohio Express Co. v. State Revenue Com., 306 U. S. 72; Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., 295 U. S. 285; Capitol Greyhound Lines v. Brice, 339 U. S. 542.)

The initial question which we are called upon to determine, in the individual cases before us, is whether any one of them is distinguishable from the holding in Clark v. Paul Gray by reason of the findings of the trial judge below. For reasons presently to be stated, we think that upon the material and essential facts none of the cases can be distinguished from the Clark case and consequently each is controlled by it, so far as the attack against the Caravan Act of 1937 is rested on federal constitutional grounds.

In the Clark case the court said: "It is true that the district court found that the practice of caravaning creates no additional traffic hazard, nor any undue wear and tear on the highways. But in this we think that its determination was not only contrary to the evidence, *but went beyond the judicial province.*" (Italics supplied.) Likewise, it is true in the cases before us that the trial court found, as did the trial court in the Clark case that caravaning created no additional traffic hazard, nor any undue wear and tear on the highways. Indeed, in the instant cases the trial court went much further in its finding of facts which, in many instances, we regard as being contrary either to the evidence or to the physical facts, and, in every instance, beyond the judicial province. The facts as found by the trial court, as stated in its "Memo of Decision," reads as follows:

> "I do not find anything in the evidence taken here to support the conclusion of the trial court, as related on page 411 of the opinion in the case of Morf vs. Bingaman, 298 U. S. 407, and reiterated in the case of Clark vs. Gray, 306 U. S. 583. . . . . , with all due respect to the justices of that court.
>
> "I cannot find from the evidence here that the drivers of caravan cars had little interest in the vehicles they drive, nor any less regard than those of state licensed cars for the safety and convenience of others using the highway. They were certainly interested in protecting themselves from injury. Nor can I find that cars thus coupled and controlled frequently or otherwise, skid, either on curves or elsewhere, or that they cause any more wear and tear on the roads than any other single car, and no more when they are driven in doubles; nor that there were any increased difficulties in the operation of the coupled cars; nor that the length of the caravans to any appreciable degree increased the hazard and inconvenience to passing traffic; nor can I find from the evidence here that such traffic involved a special type of use of the highways which enhanced the wear and tear on the roads, nor that it augmented the hazards to other traffic; nor that they

> imposed on the state a heavier financial burden for highway maintenance and policing than do other types of motor traffic. There is no evidence of this at all in my opinion."

In the usual and ordinary case instituted by or against the State, its various departments or officers, it is the duty of the trial court in non-jury cases, such as these cases are, to weigh the testimony upon the material issuable facts and make its findings thereon. But when the question at issue is that of the constitutionality of a statute, the duty which devolves upon the trial court is vastly different. In the latter case, the province of the court is not to weigh the evidence before it, but to ascertain whether there are any facts in the record *or outside of it*, of which it may take judicial notice, which would sustain the legislature in enacting the statute (Clark v. Paul Gray, 306 U. S. 583). In the instant cases there was an abundance of testimony, which the trial court was not privileged to disbelieve, which would have warranted the legislature in finding the facts directly contrary to the facts as found by the court. The fact that the trial court found that plaintiff Lord did approximately 10 to 20 per cent of the business of caravaning in this state; that he exercised considerable care in selecting the drivers who responded to ads he placed in mid-west papers where the caravaning originated; that his drivers, with one exception, had never been involved in an accident; that the tow-bar he used in case of "hookups" was the safest known; that he instructed his drivers to exercise the greatest of care, are all factors to the credit of Mr. Lord, but they are of no materiality in the solution of the questions before us. The legislature was not concerned with individual situations such as that of plaintiff Lord, but with an over-all condition, which reflected that caravaning was a dangerous or hazardous practice; that it should be taxed to meet not only the cost of policing the traffic, but to yield the state a proper *quid pro quo* for the privilege of using its highways. (Cf. Dixie Ohio Express Co. v. State Revenue Com., 306 U.S. 72; Aero Mayflower Co. v. Georgia Pub. Serv. Com., 295 U.S. 285; Capitol Greyhound Lines v. Brice, 339 U.S. 542.)

Most of the drivers engaged by *many caravan operators* to caravan vehicles have never been in California and are wholly unfamiliar with mountain driving encountered on their route in this state. In many instances they are under age and often below the age required for an operator's license in California. The drivers generally do not have California operator's licenses and quite often no licenses from any other state. By proceeding in a caravan or as a fleet, the manager and mechanic can keep a check that would not otherwise be possible. If one car becomes disabled the whole fleet stops on or alongside the road so that the mechanic can repair the car or attach it to some other car in the fleet. The necessity of driving the cars in a fleet tends to keep one tandem after another rather closely together. On a two-lane highway, and there are several at the boundaries of the state, cars behind the fleet necessarily encounter difficulty in getting ahead of the fleet as a whole or in between the various tandems. It seems quite probable that the recruit drivers of the tandems oftentimes are not inclined to be very courteous to other cars on the highway, as for instance to aid them in passing or enable them to get into the line when necessary to avoid oncoming cars. When the tandem cars are compelled to stop suddenly, there is often a tendency to skid, to sway out of line or to "jack-knife," because the brakes on the forward car must alone serve for both cars. The front part of the towed car, including the windshield, is usually covered up so as to avoid mud and rains thrown back and upon it by the lead-car. This procedure naturally obscures the vision of a driver behind such a tandem as he can only see cars ahead of the tandem by looking out of his own left window.

In the individual case of Lord the facts just recited must be modified by saying that Lord's caravans do not take any mountain routes in California; that his drivers are over the age of 21 and have chauffeur licenses issued by some state, but not necessarily California, that the drivers of his caravans have instructions from him to continue on and not stop if a car becomes disabled. But these differences in fact do not distinguish Lord's case from the Clark v. Paul Gray case. The latter case, however, involved only

the operation of motor vehicles in a single caravan, convoy or fleet of vehicles and not that of a vehicle operated as a tandem or driven singly on its own power. As plaintiff Dial drives his cars singly and not as a part of a caravan, convoy or fleet and, as the same is true, as to the plaintiff Sales companies, except that they drive their cars tandem, we turn to a discussion of these particular distinguishing features.

Unquestionably, the operation of a single passenger-type vehicle or of two such cars driven tandem is not as hazardous, as when driven as a part of a large caravan, fleet or convoy or as is the case of two large trucks or vans driven tandem. Nevertheless, the operation by Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan. However, Dial's drivers receive no pay whatever for their services nor do they receive lodging and food, and, what is more, must furnish such costs out of their own pockets, all of which is not true in the case of Lord. *Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord,* as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do.

But quite apart from these differences of fact it is obvious that the State may impose the caravan tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper.

Respondent Dial contends that there is nothing to distinguish his operations from that of a person who drives a passenger motor vehicle on a highway not for gain, or of a "dealer" or "transporter" who is permitted to drive such a vehicle for gain within a single zone, using dealers or transporters license plates which cost at most five dollars a set. We think the contention overlooks fundamental distinctions. (Cf. Dixie Ohio Express Co. v. State Revenue Com., 306 U.S. 72; Matter of Application of Schuler, 167 Cal. 282.) As was said in Hayes v. Missouri, 120 U.S. 68: "The Fourteenth Amendment to *the Constitution of the*

United States does not prohibit legislation which is limited either in the objects to which it is directed, or by *the territory within which it is to operate.* It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* v. *Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, *if within the sphere of its operation* it affects alike all persons similarly situated, is not within the Amendment.' " (Italics supplied.) The cognate provisions of our state constitution do not differ in substance but only in terminology with those of the federal constitution.

First, and foremost in considering the cases before us, it needs to be recalled that the State owns its highways and consequently may impose reasonable fees for their use by vehicles moving interstate or intrastate. It may classify the traffic, among other things, according to the character of the traffic, or the purpose for which the highways are used, as for instance whether it be for private gain or not. (Dixie Ohio Express Co. v. State Revenue Com., 306 U.S. 72; Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., 295 U.S. 285.) The tax imposed as to vehicles in one class need have no resemblance in character or amount with that of vehicles in another class, so long as the imposition itself is reasonable with respect to the class. (Capital Greyhound Lines v. Brice, 339 U.S. 542.)

Consequently to point out, as respondents do, that motor vehicles driven by the general public, not for gain, pay only a license fee of $6.00 a year as against a fee of $15.00 for six months by respondents who operate their vehicles for gain, makes use of an entirely false analogy. Likewise, to point out that the average cost of administering and policing such general public traffic involves only a cost of $2.90 per vehicle is equally beside the point. If the State instead of requiring the payment of a license fee of $6.00 by the general public for policing and administrative purposes re-

quired no fee at all the respondents would have no standing under constitutional law—state or federal—to complain. As the State may prohibit all traffic for gain on its highways—intrastate or interstate—so it may condition the privilege of the use of its highways by such traffic at a price that is not excessive or discriminatory to traffic of like character. (Capitol Greyhound Lines v. Brice, 339 U.S. 542; Packard v. Banton, 264 U.S. 140.)

In Packard v. Banton, 264 U.S. 140, the court said: "The contention most pressed is that the act unreasonably and arbitrarily discriminates against those engaged in operating motor vehicles for hire in favor of persons operating such vehicles for their private ends, and in favor of street cars and motor omnibuses. If the state determines that the use of streets for private purposes in the usual and ordinary manner shall be preferred over their use by common carriers for hire there is nothing in the 14th Amendment to prevent. The streets belong to the public, and are primarily for the use of the public in the ordinary way. Their use for the purposes of gain is special and extraordinary, and generally, at least, may be prohibited or conditioned as the legislature deems proper. Neither is there substance in the complaint that street cars and omnibuses are not included in the requirements of the statute. The reason, appearing in the statute itself, for excluding them, is that they are regulated by the Public Service Commission Laws; and this circumstance, if there were nothing more, would preclude us from saying that their noninclusion renders the classification so arbitrary as to cause it to be obnoxious to the equal protection clause."

We pass then to consider whether the tax levied against the class falling within the Caravan Act is excessive or discriminatory with respect to the levy made to "dealers" or "transporters" for caravaning within a single zone. We start with the observation that the State is under no obligation to provide license plates to either "dealers" or "transporters" to enable them to use its highways for private gain. If it chooses to grant the privilege to operate wholly within a single limited zone and extends that privilege equally to all who are engaged in caravaning therein

there is no discrimination, as between zones, or states, or as to persons so engaged. To be sure there is a discrimination, of a sort, as between persons in one zone or state who wish to transport vehicles to another zone or state—and particularly where they are at or near a boundary line and do a large part of their business in another zone or state, but this is not a type of discrimination recognized as an illegal discrimination under the constitution—state or federal. Local "dealers" or "transporters" with their places of business in one zone and possessed of "dealer" or "transporters" license plates are accorded no greater rights or privileges than those who are not in their category, as the latter have the same rights and privileges if their operations likewise are wholly within a single zone.

The mere fact, if it be a fact, that zoning the state into two zones, may seemingly have been somewhat arbitrary and unnecessary, as respondents contend, is of no moment, so long as operators in each zone are accorded the same privileges and where, as here, it cannot be said that the legislative determination was without any substantial basis (Clark v. Paul Gray, 306 U.S. 583). The notion that a person engaged in caravaning within the borders of a state must be permitted to operate in all zones within a state without the payment of a tax is a fallacy long since exploded (Hayes v. Missouri, 120 U.S. 68; Packard v. Banton, 264 U.S. 140).

Accordingly, as neither "dealers" nor "transporters" located or operating within a single zone can transport their vehicles for the purpose of selling, buying or exchanging them beyond the limits of their own zone without paying the caravan tax, even though they are possessed of dealers or transporters license plates, it follows they have privileges equal only to those who are not so situated, including interstate transporters without such license plates. That being true it follows that there is no inequality as to them in the "protection of the law" or any discrimination as between them. The difficulty with the position taken by respondents is their assumption, that just because the law at one time accorded to "dealers" and "transporters" possessing special plates the right to transport their cars anywhere in the

state, the right could not be cut down by subsequent legislation. Naturally there is no merit in the contention.

The reason for exempting dealers or transporters from the operation of the caravan tax so long as they restrict their operations within a single zone is obvious. (Matter of Application of Schuler, 167 Cal. 282.) Dealers, as is well known, tend to confine their activities, of selling and demonstrating their vehicles to very limited areas, because of competitive and other conditions. In the case of heavier equipment such as large trucks, vans, and the like, an even lesser use is made of the highways due to the fact that buyers of such equipment generally do not require demonstrations of the equipment on the highways before making a purchase. However, such purchasers often come from a distance or require delivery of the equipment to distant points within the state. But again the use of the highways of the state is quite negligible. Moreover, sales by such dealers lead to prompt registration of the vehicles and the payment of registration fees and quite substantial property taxes. In the case of metropolitan dealers the areas generally coincide with that area; in the less populous areas the area is generally limited to a county or two. Accordingly, the use of the highways in either case is slight and not at all commensurate with the area in which their dealers plates permit them to operate. In the case of transporters the same is generally, but not always, true. However, as neither transporters nor dealers operating within a single zone or beyond are accorded privileges that are not accorded to others who have neither dealers nor transporters plates there is no legal discrimination as between any of these various groups. Companies, such as railroads or so-called automobile truckaway concerns, who own their own equipment upon which they transport motor vehicles are in a distinct class and so are not to be compared with the respondents. We see no need of elaborating upon the point or of setting forth the differences existing between the two groups. (Cf. Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., 295 U.S. 285; Packard v. Banton, 264 U.S. 140.)

The respondents next contend that the license fee of $7.50 levied for the purpose of reimbursing the State for

expenses incurred in the collection of such fees and in the administration and enforcement of the act and the expense of policing the highways with respect to caravaning is excessive.

The burden of showing the fee is excessive is upon respondents and not on appellants as respondents contend. (Clark v. Paul Gray, 306 U.S. 583.) The cases cited by respondents such as D. E. Foote & Co. v. Stanley, 232 U.S. 494, Great Northern R. Co. v. Washington, 300 U.S. 154, *Brimmer* v. *Rebman*, 138 U.S. 78, involved in whole or in part "inspection fees" where the rule as to the burden of proof is otherwise. This is due to the fact that Article I, sec. 10, of the federal constitution expressly provides that "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." No "imposts or duties on imports or exports" are here involved as was the situation in the cases mentioned. We think the respondents here failed to meet the burden. To be sure the trial court found, upon insufficient evidence and a misconception of law, that the license fees were excessive in that the cost was much less than $5.00.

The court seems to have arrived at this figure in large part, if not wholly, by using as a yardstick the average cost of policing *all* registered motor vehicles operated within the state and the cost of administering the Motor Vehicle Act and the Caravan Act which the court found amounted to $2.90 per vehicle. Not only was this not a proper criterion, but it ignored various highly important factors. For instance, the cost of ferreting out those who sought to evade the caravan tax—who driving on the highway could not be distinguished from the general motoring public; the saving involved in having a single well-established over-all police force and administrative unit, intsead of a separate one set up to police or administer the Caravan Act; and, other factors which need not here be detailed. It is enough to say, as the Supreme Court of the United States has said, that "the States are not hobbled in exercising rough judgment in devising tax formulas, giving to . . . [the] . . . relevant factors such respect as is fairly within the restraints

of decency." (Capitol Greyhound Line v. Brice, 339 U.S. 542—the language is of the dissent, but not contrary to language of the majority.) In the cases before us we take judicial notice of the fact that the rail freight transportation charge of a single passenger motor vehicle from Detroit to Los Angeles costs between $250.00 and $350.00, whereas operated on its own wheels over the highways between Detroit and Los Angeles it is much less than $100.00. Accordingly, a charge of $15.00 per vehicle (1) *for policing and administration of the Act* and (2) for the privilege of using the highways of this State for a period of six months is not economic discrimination, much less illegal discrimination and in no event excessive. In that connection it needs to be observed that the Caravan Act tax is in lieu of all other taxes policing or otherwise so long as the vehicle taxed is not sold or exchanged during the six-month period and entirely regardless of the mileage covered by the vehicle over the state highways or any other factor. To illustrate how this can redound in favor of a caravan taxpayer as against a registered car owner, let us review the status of each at the end of five months. If a passenger vehicle is purchased for $3,000.00 in the Middle West and brought into the state and registered in January the registered owner must pay a license tax of $6.00 (Vehicle Code, sec. 370) and an additional property tax of about $60.00 (Rev. & Tax. Code, sec. 10752). If he brings the car into the state and has it registered in June he pays only 7/12 of these amounts or a total of $38.50. In the case of a caravan owner he pays a caravan tax of only $15.00 if the vehicle is brought into the state in January and if it is sold and registered in June the purchaser pays only a tax of 7/12 of $66.00 or $38.50. Hence the charge against the car in the latter case for the caravan and registration fee is only $53.50 for the entire year as against a charge of $66.00 against the registered owner for the same length of time. This most certainly is not discrimination against caravaned vehicles. The fact that the caravaned vehicle may be sold by its owner within a month of its arrival in the state *in January* and as a consequence the tax totals $81.00 as against a registered owner whose tax under like circum-

stances is $66.00 is immaterial. This for the reason, as the Supreme Court of the United States states: "The fee is for the privilege for a use as extensive as the carrier [here the caravan owner] wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed . . . One who receives a privilege without limit is not wronged by his own refusal to enjoy it as freely as he may." (Aero Mayflower T. Co. v. Georgia Pub. Serv. Com., 295 U.S. 285.) So, likewise, it may be said that the owner of a caravaned car who fails to make full use of the highways of the state for a period of six months, as he is permitted by the law to do, cannot complain, that others, such as drivers for pleasure, drive several thousand miles in the same period. In short, there is in neither case any restriction on mileage.

The record before us does not disclose the initial cost expended by the State for the highways used by the respondents or the maintenance thereof, nor the separate cost of policing the caravaning thereon or of administering the Caravan Act, with respect to these highways separate and apart from the Motor Vehicle Act. What is plainly shown is that the economic saving of the use of highways by the respondent over the use of other modes of transportation exceeds many times over the cost of either the policing license fee or the use of the highways. So viewed, we fail to see that either fee is excessive or discriminatory and we see no basis whatever for holding either to be unconstitutional upon any of the grounds assigned.

If we correctly understand the position of respondents, they contend that, quite apart from any question of the constitutionality of the Caravan Act of 1937 they never were and are not now under a duty to pay the tax levied by that Act upon their activities even if they fall within the scope of the Act. In support of this contention they argue that as they are either "dealers" or "transporters" they are exempt from the operation of the Act by virtue of the provisions of the earlier enacted secs. 205, 206 and 207 of the Vehicle Code as these sections so they contend, were not repealed by the Act which repealed the Caravan Act of 1935 nor are they repealed by the provisions of the

Caravan Act of 1937. The sections of the Vehicle Code referred to permit a "dealer" (with an established place of business in California) or a "transporter" (as defined in Vehicle Code, sec. 73.3) to move upon the highways of this state motor vehicles of a character which must be registered in California, before such registration, provided such dealers or transporters have been granted "dealers' plates" and the same are displayed on the vehicle or without such plates where the movement is "from a vessel, railroad depot or warehouse over the highways to a warehouse or salesroom upon first having obtained a written permit authorizing such operation from the department."

We think it plain that the language of the later Caravan Act of 1937 which expressly refers to and includes dealers and transporters as being subject to the Act, of necessity, must be construed as modifying the provisions of secs. 205, 206 and 207. Respondents cite no authority holding to the contrary and in fact do not cite any authority in support of their argument. The net effect of the two Acts (the Vehicle Code and the Caravan Act) is to divide or classify the business of dealers and transporters into two categories, i.e., the sale or transportation or both of motor vehicles (1) wholly within a single zone and (2) from or to another zone or state. The basis for this classification rests on numerous and diverse factors which while somewhat narrow we regard as being adequately distinctive. If then the classification is proper and is not discriminatory as we have already stated it is not, the Act is constitutional.

As far back as 1914 the Supreme Court of this state in Matter of Application of Schuler, 167 Cal. 282, held that the Motor Vehicle Act was not unconstitutional because it placed ordinary operators of motor vehicles in one class and dealers in another with a differential in fees favoring the dealers. The court said: "Nor is the act illegally discriminatory either because it applies to motor vehicles *and not to other kinds* or because it places dealers in a class by themselves and exacts from them a fee of fifty dollars if they operate not more than five automobiles and ten

dollars for every motor vehicle in excess of five so operated. To the first objection the answer is that the power of the legislature being plenary in the matter of imposing this privilege tax, it may designate any class properly subject to such exaction. For the same reason it may exempt any class. (*In re Wilmerding*, 117 Cal. 287 [49 Pac. 181].) No doubt the legislature took into consideration the fact that motor cars in the possession of dealers are usually kept for sale and are not used in the ordinary way, but merely for purposes of 'demonstration' and exhibition to intending purchasers. Dealers are therefore placed in a class by themselves.

"Nor is the exemption of nonresidents from paying the tax for a period of three months an unlawful one. Similar exemptions have been sustained upon the principle that the non-residents are presumed to have paid all necessary licenses in their respective places of abode, and that their use of the roads in the territory subject to the provisions of the act is usually but temporary."

The case of Franchise Motor Freight Assn. v. Seavey, 196 Cal. 77, upon which respondents so heavily rely is not in point. In that case a statute required common carriers by motor truck desiring to operate between fixed termini or over regular routes to obtain from the Railroad Commission, as a condition of operating, certificates of public convenience and necessity. However, the statute exempted common carriers engaged exclusively in hauling the products or implements of husbandry. It was held that there was no reasonable distinction or substantial difference justifying the inclusion of the one and the exclusion of the others. We have no such case here.

Before concluding our opinion we wish to interpolate, by stating that the briefs in this case, as in many other recent cases presented to us, fail to set forth a Summary of the Facts as required by Rule 13 of the Rules on Appeal. Instead, the opening brief presents a summary of the testimony of the various witnesses which covers 86 pages. Under a heading entitled Statement of Evidence consisting of 90 pages respondents likewise give us merely a narrative resume of the testimony of the various witnesses. These

summaries of evidence are not what is contemplated by the rule. As a consequence of the presentation here made we have been compelled to ferret out a statement or summary of the material facts which should have been given to us in the briefs. We give the warning now so that in future cases, counsel will not be taken by surprise if they find their briefs are stricken for failure to comply with the rules.

The judgments in each of the above-entitled cases along with the special order in cause No. 17237 are hereby reversed with instructions to the trial court to enter judgments for the defendants therein and to enter an order directing that the moneys (apparently in the sum of $86,177.50 now held in a special fund by the Department of Motor Vehicles be paid into the State Treasury.

HANSON, J. Pro Tem.

We concur:

WHITE, P.J.

DORAN, J.

APPENDIX B.

THE CARAVAN ACT OF CALIFORNIA INVOLVED

(Chap. 788, Stat. of 1937, page 2253 as amended.)

CARAVAN ACT

[Chapter 788, Statutes of 1937, page 2253, as amended, Deering's California General Laws, Act. 5136.]

An act to regulate the caravaning of vehicles upon the public highways of this State, defining the term "caravaning" and providing for the licensing of vehicles in caravan for the privilege of using the public highways and for the cost of regulating persons engaged in caravaning and providing such fees shall be a lien and for the enforcement of such liens and the collection and disposition of such fees and imposing penalties for violation thereof, and to repeal an act entitled "An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term 'caravaning' and providing for the licensing of

motor vehicles in caravan and imposing penalties for violation thereof," approved July 6, 1935, declaring the urgency thereof, and providing that it shall take effect immediately.

§ 1. Caravaning defined.
§ 2. Dealer defined.
§ 3. Permit required for use of highway.
§ 4. Fees chargeable.
§ 5. Term of permits: Form.
§ 6. Permit charge in lieu of other fees.
§ 7. Collection and distribution of fees.
§ 8. Act inapplicable to interzone transportation.
§ 9. Listing of caravaned vehicles.
§ 10. Proof of origin of unregistered vehicle.
§ 11. Time for payment of fees: Lien for fees: Refunds.
§ 12. Enforcement of lien: Seizure and sale.
§ 13. Violation of act a misdemeanor.
§ 14. Constitutionality of Act.
§ 15. Act of 1935 repealed.
§ 16. Emergency clause.

§ 1. Caravaning defined. The term "caravaning" as used in this act shall mean the transportation of any vehicle of a type subject to registration under the Vehicle Code, operated on its own wheels, or in tow of a motor vehicle, for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser, whether such agent, dealer, purchaser or prospective purchaser may be located within or without this State.

§ 2. Dealer defined. The term "dealer" when used in this act shall mean and include every individual, partnership, corporation or trust whose business in whole or in part is that of caravaning new or used vehicles as herein defined, or of selling or exchanging new or used vehicles, and shall include every agent or representative of every such person engaged in such business, except that nothing herein contained shall be construed to require the performance of any act or the payment of any fee by any agent or

representative which has previously been performed or paid by his principal.

§ 3. Permit required for use of highway. No person, firm or corporation, shall use any highway in this State for caravaning vehicles unless and until there shall first have been secured from the Motor Vehicle Department of the State of California upon application at its office in Sacramento or any of its regularly established branch offices other than stations at the State boundary line a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicles, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible.

§ 4. Fees chargeable. As a condition precedent to the use of the highways of this State for the purpose of caravaning and the issuance of any special permit provided for in the previous section of this act, the Motor Vehicle Department of the State of California shall charge and collect, for each vehicle for which a caravan permit may be issued whether such vehicle be operated under its own power or in tow of a motor vehicle, a fee of seven and fifty one-hundredths dollars as compensation for the privilege of using the public highways of this State and a fee of seven and fifty one-hundredths dollars to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation.

§ 5. Term of permits: Form. Permits issued pursuant to the provisions of this act shall be valid for a period of six months after date of issuance and shall be valid only in the hands of the original permittee but shall not authorize the operation of any vehicle other than that for which originally issued. Such permits shall contain such information and be in such form and shall be issued under such rules and regulations as may be prescribed by said Motor Vehicle Department.

§ 6. Permit charge in lieu of other fees. The fee paid for any caravaning permit issued under this act shall be in lieu

of all other registration fees and license fees for the use of public highways in this State by such vehicle during the period that such vehicle may be operated for the purpose of sale or exchange under and solely in accordance with such permit upon the public highways of this State; provided, however, that nothing in this section shall exempt the owner or operator of such vehicle from compliance, except with respect to fees or license charges, with all laws of this State now or hereafter adopted, relating to safety in the use of the public highways.

§ 7. Collection and disposition of fees: Purpose. All fees from the issuance of permits provided for under this act shall be collected by the Motor Vehicle Department. Such fees shall be paid into and become a part of the Motor Vehicle Fund in the State Treasury. The moneys so derived by the State are intended as compensation for the privilege of using the highways of this State and to reimburse the State Treasury for the added expense which the State may incur in the collection of such fees and in the administration and enforcement of this act and the expense of policing the highways over which such caravaning may be conducted. [Amended by Stats Ex Sess 1947, ch 11, § 26.]

§ 8. Act inapplicable to interzone transportation. The provisions of this act shall not apply to the transportation of motor vehicles between points within Zone 1 or between points within Zone 2, which zones are hereby defined as follows:

Zone 1—That part of the State of California lying within the counties of San Diego, Imperial, Orange, Riverside, San Bernardino, Los Angeles, Ventura, Santa Barbara, San Luis Obispo, Kern, Inyo and Mono;

Zone 2—That part of the State of California not included within Zone 1 as herein defined. [Amended by Stats. 1941, ch. 584, p. 1966, § 1.]

§ 9. Listing of caravaned vehicles. Every dealer in vehicles shall report to and list with the Motor Vehicle Department on forms to be prescribed by such department and in accordance with rules in regard thereto promulgated

by such department, each vehicle received, held or offered by him for sale which has been caravaned over the public highways of this State. Such report and listing shall be made forthwith upon the receipt of such vehicle. Such report, among other things, shall show the number of the caravan permit authorizing the operation of the vehicle covered in such report. In the event no permit has been secured for such operation payment of the required fees and penalty shall be made to the department and shall accompany such report. In the event permit fees required by this act are not paid when due a penalty of fifty per cent of such fees for each such vehicle shall be assessed and collected by the department.

§ 10. Proof of origin of unregistered vehicle. On demand of the Motor Vehicle Department, any dealer in vehicles shall furnish to the department evidence as to the origin of any vehicle not previously registered in this State which is held or offered by him for sale, and evidence of the manner in which such vehicle was transported to the place in which it is or has been held or offered for sale. It shall be prima facie evidence that a vehicle not previously registered in this State is or has been transported for purpose of sale if it is exchanged, sold or offered for sale within thirty days after it has been operated over the public highways of this State.

§ 11. Fees due and payable in advance: Lien: Refund of fees. The permit fees provided for herein shall be due and payable in advance of the operation upon the public highways of any vehicle for which such permit is required and shall be a lien against the vehicle for which they are due during the time such vehicle is held for sale or offered for sale or resale.

Whenever the department collects any fee not required to be paid hereunder, the same shall be refunded, upon approval of the claim by the Director of Finance, to the person paying the same upon application therefor made within one year after the date of such payment. [Amended by Stats 1947, ch 917, § 1; Stats 1949, ch 149, § 1.]

§ 12. Enforcement of lien: Seizure and sale. The department shall collect the permit fees and enforce the liens

provided for herein by seizure of the vehicle or vehicles upon which such fees are a lien from the person or persons in possession thereof, if any, and by sale of such vehicle. The seizure and sale herein authorized may be made at any time after such fees become due and shall be conducted and carried out by the department in the same manner as is provided by law for the seizure and sale of personal property by the assessor for the collection of taxes due on personal property.

§ 13. Violation of act a misdemeanor. Violation of any of the provisions of this act is a misdemeanor punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both such fine and imprisonment.

§ 14. Constitutionality of act. If any section, paragraph, clause or phrase of this act should be held to be unconstitutional by any court of competent jurisdiction such holding shall not affect any other part of this act and it is hereby declared to be the intention of the Legislature that no section, paragraph, sentence, clause or phrase of this act has been an inducement to the enactment of any other part hereof.

§ 15. Act of 1935 repealed. An act entitled "An act to regulate the caravaning of motor vehicles upon the public highways of this State, defining the term 'caravaning' and providing for the licensing of motor vehicles in caravan and imposing penalties for violation thereof," approved July 6, 1935, is hereby repealed.

§ 16. Emergency clause. This act is hereby declared to be an urgency measure within the meaning of section 1 of Article IV of the Constitution, necessary for the immediate preservation of the public peace, health and safety and as such shall take effect immediately.

The following is a statement of facts constituting such necessity:

Experience has shown that, due to climatic conditions, the caravaning of vehicles occurs almost exclusively during the spring and summer months. It is necessary, therefore, in order to regulate caravan vehicles, the number of which is now increasing, that this act shall take effect immediately.

APPENDIX C

OPINION IN LORD v. *GARLAND*, 27 CAL. 2d 840

Lord v. *Garland*, 27 Cal. 2d 840 (p. 843)

EDMONDS, J.—Soon after the Caravan Act (Stats. 1937, p. 2253; Deering's Gen. Laws, 1937, Act 5136) went into effect, Harry A. Lord sued to enjoin the director and other officers of the Motor Vehicle Department from enforcing its provisions as to him. While that suit was pending, he brought the present action "for declaratory relief, injunction and recovery of deposit." The director and the registrar of the *Motor Vehicle Department then in office were named as defendants. Their demurrer to the complaint was sustained without leave to amend, and the principal question presented upon Lord's appeal from the judgment subsequently entered concerns the plea of abatement relied upon by the respondents as justification for the dismissal of the action.

The Caravan Act imposes a fee of $15 upon each automobile driven upon the state highways under specified circumstances. Pursuant to a stipulation in the first suit and an order of the court based thereon, Lord paid to the Motor Vehicle Department the fees imposed by the statute upon the condition that, if the statute should finally be declared unconstitutional in that action or otherwise, the amount deposited should be returned to him, but in the event of a contrary determination, the department might retain the fund, which now amounts to over $88,000. As the suit was not brought to trial within five years, it was dismissed upon that ground (Code of Civ. Proc. § 583), and the judgment has become final. (*Lord* v. *Ingels*, 64 Cal. App. 2d 559 [149 P. 2d 72].)

The present action was filed during the pendency of the appeal in the first suit. The complaint is in three counts. The first is for a declaration of the rights of the parties to the money deposited under the stipulation and order in the prior litigation, a determination of the constitutionality of the Caravan Act, and an order enjoining the state officials,

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as trustees, from disposing of the fund created pursuant to the stipulation prior to an adjudication upon the merits. More specifically, it is alleged that, for more than seven years, Lord has been, and at the time of the filing of the complaint was, engaged in the business of caravaning automobiles from various eastern states into California. The vehicles so caravaned are owned by dealers and distributors doing business in California. Lord acts as the transporter for these distributors and dealers and is paid by them a flat price, which includes all taxes and license fees levied, and his net compensation for the caravaning depends upon the amount of taxes required to be paid.

Other allegations of this count are that it is a suit in equity to enjoin the enforcement of the Caravan Act, which statute violates specified sections of the state and of the federal Constitution. The caravaner's responsibility for a vehicle brought into the state ceases upon delivery to the distributor *or dealer who owns it. Lord has been advised by the director and registrar of the Motor Vehicle Department that they will enforce the provisions of the Caravan Act and that he will have to pay the taxes required by the statute.

The complaint then pleads the commencement of the former action and the issuance of the preliminary injunction by which the enforcement of the statute was stayed. The text of the stipulation in that action, and also of the order based upon it which authorized the deposit of fees in lieu of a bond, is included in the facts stated by Lord.

When the prior action was dismissed, the complaint continues, the order made no provision for the disposition of the special fund which amounts to $88,282.50, but the court expressly reserved continuing jurisdiction until the final disposition of the money. In the former suit no determination was made in regard to the constitutionality of the statute, and although the special fund is subject to the jurisdiction and order of the court, the officers of the Motor Vehicle Department, notwithstanding the unconstitutionality of the Caravan Act, threaten to transfer the money

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on deposit and apply it to the payment of taxes as soon as the judgment of dismissal in the former action becomes final, which will be prior to any adjudication upon the question of constitutionality and contrary to the provisions of the order and stipulation.

Lord also pleads in this count that because of the claim to the money on deposit, an actual controversy exists between him and the state officers relating to the legal rights and duties of the respective parties. The proper interpretation of the stipulation and of the order made thereon, he asserts, is that the special fund must be maintained inviolate pending the determination of the rights of the parties in this action. Under these circumstances, he concludes, the court should grant declaratory relief as to the rights of the parties, make its decision upon the question of the constitutionality of the statute under the second cause of the complaint, and render judgment for the disposition of the deposit accordingly.

The second count of the complaint includes, by reference, the prior allegations relating to the manner in which Lord conducts his business and the requirement of the officers of the Motor Vehicle Department that he pay the fees fixed by the statute. It is also alleged that the Caravan Act is unconstitutional upon certain grounds specifically enumerated in the first count.

In more detail, Lord pleads that the Caravan Act levies a tax upon each and every automobile driven upon any highway of the State of California for the purpose of offering it for sale and excepts from the operation of the law each automobile transported wholly within certain zones. All of the caravaning from eastern states done by Lord in California is exclusively within a single zone as defined by the act, although occasionally he caravans between two zones as defined in the statute and from points within the state to points outside of California. The officers charged with the enforcement of the legislation have informed Lord that they will continue to require of him a special permit as to each and all of the vehicles which he shall in the

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future caravan into the state. There is no provision of law whereby he may recover from these officers, or from the state, any sum or sums paid or to be paid. He has no plain, speedy or adequate remedy at law, this count concludes, and unless the court enjoins the enforcement of the statute, he will suffer irreparable damage.

The third count pleads, by reference, all of the allegations of the first count, except those dealing with the controversy concerning the stipulation and order. The relief asked in this count is for judgment in the amount of $88,282.50.

The respondents demurred "to the whole complaint," pleading "that there is another action pending between the same parties for the same cause," and that several causes of action are improperly united, namely, those stated in counts one and two of the complaint. As additional grounds for demurrer, they alleged that the first and third counts state insufficient facts to constitute a cause of action, and that the second count is ambiguous, unintelligible, and uncertain.

The record does not indicate the basis for the ruling of the trial court sustaining the demurrer without leave to amend, or that any ground for demurrer was abandoned. In support of his contention that the order was improper, the appellant argues that although the plea in abatement was directed to the "whole complaint," it is not well taken against count two as the allegations concerning the prior suit appear only in counts one and three; that the litigation first com*menced did not involve the identical parties and causes of action, and as the demurrer upon the ground of the prior action was directed to the entire pleading, without specifying any particular count, and is not sustainable against at least two of the causes of action, it should have been overruled. Concerning the charge that the first and second counts of the complaint are improperly united, Lord justifies their inclusion in the same complaint upon the ground that by each of them he seeks equitable relief in regard to "Claims arising out of the same transaction, or

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transactions connected with the same subject of action" as allowed by section 427, subdivision 8, of the Code of Civil Procedure.

The general demurrer to the first cause of action, according to Lord, was argued only upon the erroneous premise that declaratory relief cannot be had against the state, and that directed to the third cause of action should also have been overruled, he insists, for the sole objection urged against it was that, as it differs only from the first cause of action in the relief asked, it is subject to the same ruling made upon the first count. Finally, says Lord, upon any ground, the demurrer should not have been sustained without leave to amend, and assuming that the trial court did not err in its determination concerning the plea in abatement, it should have limited its ruling to an interlocutory judgment suspending the action until final determination of the prior cause.

Considering the demurrer to the complaint as a whole, the respondents take the position that Lord is now suing upon the same facts to obtain the same relief which he asked in the prior litigation against the same parties. The same controversy is the basis of the present action, according to the attorney general. Before final judgment in the first action, any further litigation was unnecessary and vexatious; now, Lord may bring a new action attacking the constitutionality of the Caravan Act. Also, in support of the judgment, the respondents maintain that because, in the first suit brought by Lord, the court eventually must order a disposition of the money held by the Motor Vehicle Department, the general demurrer to the first cause of action was properly sustained without leave to amend. The facts alleged in that count, the argument continues, do not show a legal obligation arising under the circumstances specified in section 1060 of the Code of Civil Procedure, hence there is no justiciable dispute between the parties.

*Turning to the second cause of action, *Clark* v. *Gray*, 306 U. S. 583 [59 S. Ct. 744, 83 L. Ed. 1001], in which the constitutionality of the Caravan Act was upheld, is relied

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upon to support the ruling of the trial court. The last count of the complaint is said to have the same infirmities as the first cause of action. The respondents argue that at the time the demurrer was sustained, Lord was attacking the stipulation and order in a case which was then pending, and so far as the disposition of the money is concerned, neither count states a cause of action. Finally, the causes of action now separately stated are not of the kind which may be joined under any provision of section 427 of the Code of Civil Procedure.

(1) Under section 430 of the Code of Civil Procedure the pendency of another action between the same parties for the same cause is made a ground for demurrer. The plea is dilatory in its nature and is not favored. It may be made only when the face of the complaint shows that the causes of action and the issues in the two suits are substantially the same. (*Knapp* v. *Knapp*, 15 Cal. 2d 237, 243 (100 P.2d 759); *O'Hara* v. *Grand Lodge* I.O.G.T., 213 Cal. 131, 144 (2 P.2d 21); *Conner* v. *Bank of Bakersfield*, 174 Cal. 400, 402 (163 P. 353); *National Auto Ins. Co.* v. *Winter*, 58 Cal. App. 2d 11, 16 (136 P.2d 22); *Burnau* v. *Irigoyen*, 56 Cal. App. 2d 624, 631 (133 P.2d 3); *Warner* v. *Roadshow Attractions Co.*, 56 Cal. App. 2d 1, 7 (132 P.2d 35).) (2a) Where, for all that appears in the complaint, the prior suit does not involve the entire cause of action presented by the complaint in the later litigation, the plea of abatement should be raised by answer rather than by demurrer. (*Conner* v. *Bank of Bakersfield*, supra, p. 403; *National Auto Ins. Co. v. Winter*, supra, p. 16.)

(3) As a test for determining whether the causes of action are the same or different, it is the universal rule that a plea in abatement may be maintained only where the claim sued upon in the second action is such that a final judgment in the first one could be pleaded in bar as a former adjudication. (*Baker* v. *Eilers Music Co.*, 175 Cal. 652, 655 (166 P. 1006); *McCormick* v. *Gross*, 135 Cal. 302, 305 (67 P. 766).) "While it is true that as a general rule a judgment is a bar as res judicata not only as to a subsequent action on the same matter actually determined, but also as to all issues that might have been litigated as incident to or

essentially connected with the subject matter of the litiga-
*tion and every matter coming within its legitimate purview . . ., it is also true that that only is adjudged in a former judgment which appears upon its face to have been adjudged or which was actually and necessarily included therein or necessary thereto. . . . And when it affirmatively appears that an issue was not determined by the judgment, it obviously is not res judicata upon that issue." (*Stark* v. *Coker*, 20 Cal. 2d 839, 842 (129 P.2d 390).) Other recognized exceptions to this rule "include a situation wherein it has appeared that the questioned issue in the subsequent action was neither germane to nor essentially connected with the actual issues that were raised in the former action, even though, with propriety such issues might have been presented therein. . . . Nor is the rule applicable to rights, claims or demands, although growing out of the same subject matter, but which constitute separate or distinct causes of action, and which were not put in issue in the former action." (*Title Guarantee & Trust Co.* v. *Monson*, 11 Cal. 2d 621, 631 (81 P. 2d 944); see, also, *City of San Diego* v. *California Water & Tel. Co.*, 71 Cal. App. 2d 261, 276 (162 P.2d 684).)

(4) And the rule of res judicata extends only to the facts and conditions as they existed at the time the judgment was rendered, or more correctly speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action. (*Bank of America etc. Assn.* v. *McLaughlin*, 22 Cal. App. 2d 411, 415 (71 P. 2d 291, 72 P. 2d 554).)

[2b] Applying the foregoing rules to Lord's complaint in the present case, it does not appear upon the face of that pleading whether all matters now sued upon were adjudged in the former action, nor whether such matters were actually and necessarily included therein or necessary thereto.

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Neither does it appear whether other facts or conditions intervened before the commencement of the second suit. For these reasons, at least, the objection upon the ground of another action pending should have been raised by answer rather than by demurrer. (5) Also, the demurrer to the entire complaint that another action was pending is not applicable to the second count of the complaint which makes no ref*erence to the former action. (6, 7) In ruling upon a demurrer, the averments of one count cannot be amplified by the allegations of another separately stated cause of action in the same pleading unless the latter are included by special reference or otherwise in the portion of the complaint under attack (see *Hopkins* v. *Contra Costa County*, 106 Cal. 566, 570 (39 P. 933); *Bidwell* v. *Babcock*, 87 Cal. 29, 33 (25 P. 752); *Baldwin* v. *Ellis*, 68 Cal. 495, 496 (9 P. 652); *Haskell* v. *Haskell*, 54 Cal. 262, 265), and a demurrer which attacks an entire pleading should be overruled if one of the counts therein is not vulnerable to the objection. (*Brandt* v. *Brandt*, 178 Cal. 548, 550 (174 P. 55); *Jensen* v. *Dorr*, 159 Cal. 742 745 (116 P. 553); *Armstrong* v. *Adams*, 102 Cal. App. 677, 681 (283 P. 871); *Wakeman* v. *Green*, 98 Cal. App. 50, 52 (276 P. 387).)

(8a) But assuming that the ruling upon this point was correct, the court should not have denied leave to amend. The judgment dismissing the prior action for want of prosecution is not one upon the merits (*Superior Oil Co.* v. *Superior Court*, 6 Cal. 2d 113 (56 P. 2d 950); *Bell* v. *Solomons*, 162 Cal. 105 (121 P. 377); *Matteson* v. *Klump*, 100 Cal. App. 64 (279 P. 669)) and it does not bar a subsequent action upon the same cause. (*Gonsalves* v. *Bank of America*, 16 Cal. 2d 169 (105 P. 2d 118); *Goddard* v. *Security Title Ins. & Guar. Co.*, 14 Cal. 2d 47 (92 P. 2d 804).) Section 597 of the Code of Civil Procedure, as amended in 1939, provides that when an answer pleads a prior action pending, or any other defense constituting a ground of abatement, such special defense shall first be heard, "and where the defense of another action pending is sustained (and no other special defense is sustained) an interlocutory judgment shall be entered in

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favor of the defendant pleading the same to the effect that no trial of other issues shall be had until the final determination of such other action, and the plaintiff may appeal from such interlocutory judgment. . . ."

(9) The word "answer," as used in the other sections of the Code of Civil Procedure, has been construed as broad enough to include a demurrer. For example, in *Evans* v. *Superior Court*, 14 Cal. App. 2d 743 (59 P. 2d 159), it was held that the provisions of section 581a, which authorize the dismissal of an action where no answer is filed and plaintiff fails to have judgment entered within three years after service of summons, must be construed as including a demurrer. The courts also concluded that the filing of a demurrer prevented the entry of a judgment when section 585 of the Code *of Civil Procedure provided that, if no answer had been filed within the time specified in the summons, the clerk must enter the defendant's default and immediately enter judgment for the amount demanded. (*Fletcher* v. *Maginnis*, 136 Cal. 362 (68 P. 1015); *Oliphant* v. *Whitney*, 34 Cal. 26; *Davidson* v. *Graham*, 25 Cal. App. 484 (144 P. 147).) (10) By analogy, at least, the word "answer" as used in section 597 of the Code of Civil Procedure is broad enough to include demurrer and an interlocutory judgment should also be entered where the plea in abatement is presented by demurrer. (See: 1 Cal. Jur. 37 and cases there collected.)

(11) The purpose of the interlocutory judgment under circumstances such as are shown in the present case is to permit the trial court to retain jurisdiction over the subsequent action so that when a final determination is had in the prior pending action the court will be empowered to determine the issues in the subsequent suit. (12) If a judgment upon the merits is rendered in the suit first commenced, the party asserting the plea in abatement should be granted leave to amend to plead the res judicata effect of the judgment in bar of the subsequent action. (8b) but if, as in the present case, the prior litigation is not determined upon the merits, the trial court should hear and decide the rights of

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the parties in accordance with the issues presented by the pleadings in the second action.

(13) The appellant relies upon a number of decisions which turned upon the defense of another action pending, but in none of them was a judgment of dismissal, which followed an order sustaining a demurrer without leave to amend, affirmed upon appeal. The only relief to which a litigant is entitled upon the plea, by either demurrer or answer, that a prior action between the same parties is pending and undetermined is the judgment specified by section 597, Code of Civil Procedure, that the second action abate. The order, if based upon that plea, was therefore erroneous and if none of the other grounds of demurrer justifies the ruling, it was an abuse of discretion to withhold leave to amend.

(14) Considering the general demurrer to the first count from the standpoint of the sufficiency of the pleading to state a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure, one invoking that remedy must allege facts from which the court may determine that an actual controversy relating to legal rights and duties of the respective parties exists. (*City of Alturas* v. *Glosier*, *16 Cal. 2d 46, 48 (104 P. 2d 810); *Frasch* v. *London & Lancashire F. Ins. Co.*, 213 Cal. 219, 225 (2 P. 2d 147); *American Tel. & Tel. Co.* v. *California Bank*, 59 Cal. App. 2d 46, 51 (138 P. 2d 49).) Lord's allegations comply with this requirement; they state a cause of action for such relief and would support a declaratory judgment. (15) The remedy however, may be refused in the discretion of the trial court if it appears that the determination is not necessary or proper at the time and under all the circumstances. (Code Civ. Proc., § 1061.) (16) Where the facts pleaded by the plaintiff would justify a trial court in applying that rule, it has been held that the court may sustain a general demurrer to the complaint. (*Moss* v. *Moss*, 20 Cal. 2d 640, 642 (128 P. 2d 526, 141 A.L.R. 1422); *Simpson* v. *Security First Nat. Bank*, 71 Cal. App. 2d 154, 158 (162 P. 2d 494).) (17) However, it is equally true that section 1061 of the Code of

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Civil Procedure, which allows the trial court to refuse to render a declaratory judgment, does not apply where, upon the facts stated, the plaintiff is entitled to some relief in connection with the matter which occasioned the controversy. (*Henderson* v. *Oroville-Wyandotte Irr. Dist.*, 207 Cal. 215 (277 P. 487); *Phelps* v. *Loop*, 53 Cal. App. 2d 541 (128 P. 2d 63); *Zimmer* v. *Gorelink*, 42 Cal. App. 2d 440 (109 P. 2d 34).)

(18) As grounds for sustaining the general demurrer to the first count, the attorney general contends that the facts presented do not give rise to a present controversy and that section 1060 of the Code of Civil Procedure does not authorize the bringing of an action for declaratory relief against the state or its governmental agencies. However, considering all of the circumstances as they existed at the time the complaint was filed and in view of the fact that the action for declaratory relief may be invoked to test the constitutionality of a statute, the trial court would have abused its discretion if it had sustained the general demurrer to the first cause of action upon the ground that the remedy was not necessary or proper. (19) And, contrary to the statement of the attorney general, declaratory relief is an available remedy against the state. (*Hoyt* v. *Board of Civil Service Commrs.*, 21 Cal. 2d 399 (132 P. 2d 804).)

(20) However, Lord does not state a cause of action for injunctive relief in the first count because no facts are alleged tending to show that irreparable injury will result if the funds are converted by the respondents prior to an adjudication upon the issue of constitutionality. (*McKay Jewelers *Inc.*, v. *Bowron*, 19 Cal. 2d 595, 598 (122 P. 2d 543, 139 A.L.R. 1188); *Sunset Scavenger Corp.* v. *Oddou*, 11 Cal. App. 2d 92, 98 (53 P. 2d 188); see: 14 Cal. Jur. 261.) Conceding that an injunction is ancillary to other relief sought, he has not pleaded any equitable grounds essential to the invocation of the remedy. (*Sunset Scavenger Corp.* v. *Oddou*, supra p. 98.) (21) But where not all of a count is subject to demurrer, the objection must be directed to the particular portion of it which fails to meet the law's

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requirements, and a general demurrer to a count should be overruled if, upon any theory, it states a cause of action. (*Johnson* v. *Clark*, 7 Cal. 2d 529, 536 (61 P. 2d 767).)

(22) In count two Lord seeks injunctive relief against the enforcement of the Caravan Act upon the ground of asserted unconstitutionality. The Supreme Court of the United States has upheld the Caravan Act under the federal Constitution as written (Clark v. Gray, supra), but Lord alleges that the application of the statutory requirements to his particular methods of doing business violates the provisions of the federal and also of the state Constitution. Unlike the first count, it is here alleged that there is no provision of law whereby the appellant may recover from the respondents or from the State of California any money paid to the Motor Vehicle Department as taxes. To this count of the complaint the respondents demurred only upon the ground that it is uncertain, ambiguous and unintelligible, in certain enumerated particulars.

The attorney general recognizes the rule that a special demurrer should not be sustained without leave to amend if the deficiencies of a complaint can be corrected by amendment. But because of the decision in *Clark* v. *Gray*, supra, and for other reasons, he asserts, it is patent that Lord cannot amend the second count so as to present a good cause of action to test the constitutionality of the Caravan Act. The objections raised by special demurrer do not go to the failure to allege sufficient facts (*Callahan* v. *Broderick*, 124 Cal. 80, 83 (56 P. 782); see: Bancroft's Code Pleading, vol. 1, p. 347) and as the allegations of Lord's complaint are sufficiently clear to apprise the defendants of the issues which they are to meet, the special demurrer should have been overruled. (*People* v. *Lim*, 18 Cal. 2d 872, 882 (118 P. 2d 472); *Jacobson* v. *Oakland Meat etc. Co.*, 161 Cal. 425, 433 (119 P. 653, Ann. Cas. 1913B 1194).)

(23) As the third count of the complaint is for a money *judgment and is grounded upon the facts pleaded in the first count, which states a cause of action, the demurrer to it was not well taken.

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(24) Concerning other aspects of the complaint, the demurrer upon the ground that several causes of action have been improperly united is based upon the proposition that the first and second counts do not arise out of the same transaction or transactions connected with the subject of the action. (Code Civ. Proc., § 427.) But certainly every transaction of the plaintiff, including the stipulation and order thereon, is connected with the constitutionality of the Caravan Act; and the validity of that statute is the question principally at issue in each count of the complaint. (See: *Carter* v. *Turner*, 90 Cal. App. 193 (265 P. 870); *Blodgett* v. *Trumbull*, 83 Cal. App. 566 (257 P. 199); *Boulden* v. *Thompson*, 21 Cal. App. 279 (131 P. 765).)

(25) Moreover, a demurrer upon the ground of improper joinder of causes of action in the same complaint should not be sustained without leave to amend when it appears that the defect can be cured by amendment. (See: *Ehlen* v. *Burrows*, 51 Cal. App. 2d 141, 144 (124 P. 2d 82); 21 Cal. Jur. 119-122.)

It should be kept clearly in mind that at the time of the filing of the plea of another action pending and the ruling upon it, the appeal from the judgment dismissing the suit first commenced had not been decided. Although that judgment has now been affirmed, the order sustaining the demurrer to the complaint in the present litigation must be considered in the light of the circumstances as they existed at the time the plea was filed. However, if the state officials hereafter object to the further prosecution of the present action upon the ground that the first suit is still pending for a limited purpose, the question will arise whether the motion now pending in *Lord* v. *Superior Court* (see post, p. 855 (168 P. 2d 14)), for an order disposing of the fund allows the trial of issues sufficiently broad to justify a further plea in abatement.

The judgment is reversed with directions to the trial court to overrule the demurrer and to allow the respondents to answer.

Gibson, C. J., Shenk, J., Carter, J., Traynor, J., Schauer, J. and Spence, J. concurred.

APPENDIX D

OPINION IN *LORD* v. *SUPERIOR COURT*, 27 CAL 2d 855

Lord v. *Superior Court*, 27 C. 2d 855, (168 P. 2d 14,) (p. 856):

EDMONDS, J.—By this original proceeding in prohibition, Harry A. Lord is endeavoring to prevent any present disposition of the fund which is the basis of the controversy in *Lord* v. *Garland*, ante, page 840 (168 P. 2d 5).

Lord sued the director and registrar of the Motor Vehicle Department to avoid the payment of fees required by the Caravan Act (Stats. 1937, p. 2253; Deering's Gen. Laws, 1937, Act 5136) upon the ground that the statute is unconstitutional (Lord v. Ingels, 64 Cal. App. 2d 559 (149 P. 2d 72)). In connection with his suit he obtained a preliminary injunction, and furnished the required undertaking (Code Civ. Proc., § 529), the amount of which he had to increase from time to time as he brought more automobiles into the state. To avoid the inconvenience and expense of filing additional undertakings in support of the injunction, he found it expedient to deposit, in lieu of a bond, the amount of the tax required by the statute under attack.

Thereafter, upon stipulation, the preliminary injunction was, by order of the court, dissolved, the surety released from liability, and a second order made enjoining the defendants from enforcing the statute upon condition that Lord pay into a special fund to be established by the Motor Vehicle Department $15 for each car caravaned by him to California. By this order, which was based upon the stipulation, the respondent court reserved "continuing jurisdiction until final disposition of said moneys. . . ." The pertinent provisions of the stipulation upon which the order was made provided that, "all sums which are so paid shall be retained by . . . (the department) . . . in a special fund pending the final determination in this proceeding on appeal or otherwise of the constitutionality of the . . ." Caravan Act; that in the event the statute "shall be determined to be unconstitutional the sums so paid . . . shall be returned upon application to" Lord, "and in the event that the said

statute shall be determined to be constitutional the said sums . . . shall be retained by the Department . . ." Five years later, the respondent court granted a motion to dismiss the action, pursuant to the provisions of section 583 of the Code of Civil Procedure and without reserving expressly any jurisdiction over said special fund. The judgment of dismissal, subsequently entered, is now final. (*Lord* v. *Ingels*, supra.)

*Lord asserts that the superior court is about to make an order, upon motion of the defendants, for the payment to the state of more than $88,000 which he deposited in the special fund while the injunction was in force. Upon his petition, this court issued an alternative writ of prohibition and the question presented for decision concerns the jurisdiction of the superior court to determine the motion and to dispose of the money held by the Motor Vehicle Department.

The petitioner contends that the effect of the final judgment of dismissal in *Lord* v. *Ingels*, supra, was to completely deprive the superior court of all jurisdiction to hear any motion unrelated to the judgment, and the motion now pending is of that kind. The petitioner also declares that the court will be exceeding its jurisdiction in two particulars if it disposes of the fund because, (1) the court granting an injunction has no power upon its dissolution to assess damages resulting from the wrongful issuance of the writ; and (2) the court's power to dispose of the fund is limited by the stipulation of the parties that the fund is to be retained by the department until there has been a final determination of the constitutionality of the Caravan Act, supra.

(1) A writ of prohibition may issue where a lower tribunal acts without or in excess of its jurisdiction, and there is not a plain, speedy, and adequate remedy in the ordinary course of law. (Code Civ. Proc., §§ 1102, 1103.) (2) After an action has been dismissed under Code of Civil Procedure, section 583, the court is without jurisdiction to hear or determine any motion unrelated to the dismissal of the

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action. (*Cruse* v. *Superior Court*, 102 Cal. App. 290 (283 P. 73); see, *Swortfiguer* v. *White*, 141 Cal. 756 (75 P. 172); *Modoc Land etc. Co.* v. *Superior Court*, 128 Cal. 255 (60 P. 848); *White* v. *Superior Court*, 126 Cal. 245 (58 P. 450); *Cooper* v. *Gordon*, 125 Cal. 296 (57 P. 1006); *Davis* v. *Hart*, 123 Cal. 384 (55 P. 1060); *Vrooman* v. *Li Po Tai*, 113 Cal. 302 (45 P. 470); *People* v. *Southern Pac. R. R. Co.*, 17 Cal. App. 2d 257 (61 P. 2d 1184); *King* v. *Superior Court*, 12 Cal. App. 2d 501 (56 P. 2d 268); *Pearson* v. *Superior Court*, 122 Cal. App. 571 (10 P. 2d 489); *Sauer* v. *Superior Court*, 74 Cal. App. 580 (241 P. 570); 9 Cal. Jur. 534; 27 C.J.S., p. 261, § 77) (3) However, this general rule is subject to exceptions and a court is not divested of jurisdiction for all purposes after the dismissal of an action (See, *King* v. *Superior Court*, supra; *Davis* v. *Superior Court*, 184 Cal. 691 (195 P. 390) *Cooper* v. *Gordon*, supra; **Cruse* v. *Superior Court*, supra; 27 C.J.S. 261, § 77.) Thereafter the court has the power to determine the disposition of funds held in *custodia legis* after notice to all parties interested. (In re *Shyvers*, 33 F. Supp. 643; see, *Agricultural Bond & C. Corp.* v. *Courtenay F. Co-op. Ass'n.*, 66 N.D. 122 (262 N.W. 453); *Union Bank & Tr. Co.* v. *Los Angeles County*, 2 Cal. App. 2d 600 (38 P. 2d 442); *Higgins* v. *Keyes*, 5 Cal. App. 482 (90 P. 972); *Anderson* v. *Ferguson*, 56 Idaho 554 (57 P. 2d 325).) (4) Furthermore, in the present case the court by its own order reserved continuing jurisdiction over disposition of all moneys in the special fund, and no final judgment with respect to that phase of the case having been entered at the time of the dismissal of the action, the court retained jurisdiction to complete the matter. (See, *McAdoo* v. *Sayre*, 145 Cal. 344 (78 P. 874); *Becker* v. *Munkelt*, 27 Cal. App. 2d 761 (81 P. 2d 1041); *County of Los Angeles* v. *Industrial Acc. Com.*, 76 Cal. App. 639 (245 P. 796); 14 Am. Jur. 373; 15 C.J. 810; 21 C.J.S., p. 134, § 86.)

(5) A further question for decision is whether the respondent court will be acting in excess of its jurisdiction if it orders the funds delivered to the state. This court has said,

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"Speaking generally, any acts which exceed the defined power of a court in any instance, whether that power be defined by constitutional provisions, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction, in so far as that term is used to indicate that those acts may be restrained by prohibition or annulled on certiorari." (*Redlands etc. Sch. Dist.* v. *Superior Court*, 20 Cal. 2d 348, 358, 359 (125 P. 2d 490), quoting *Abelleira* v. *District Court of Appeal*, 17 Cal. 2d 280, 291 (109 P. 2d 942, 132 A.L.R. 715); see, *Fortenbury* v. *Superior Court*, 16 Cal. 2d 405, 407 (106 P. 2d 411).) Here the petitioner is asking this court, upon prohibition, to decide who is entitled to the fund held in custodia legis. Although by the dismissal of the action there is only the narrow issue concerning the disposition of the money open for decision, the court has jurisdiction to determine the rights of the parties under the stipulation and order. Consistent with the exercise of that jurisdiction, the court might require that the fund be retained by the Motor Vehicle Department as a special deposit, subject to judicial order, until there is a final determination of the issue of constitutionality in the second suit brought by Lord. It might also require the Motor Vehicle *Department to pay the money into court to await the decision of that suit. (See: *United States* v. *Morgan*, 307 U. S. 183 (59 S. Ct. 795, 83 L. Ed. 1211).) This court must assume that within the limited field left by the dismissal of the action, the court will fully protect the rights of the parties under the stipulation and order.

The alternative writ of prohibition is discharged and a peremptory writ is denied.

Gibson, C. J., Shenk, J., Carter, J., Traynor, J., Schauer, J., and Spence, J., concurred.

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APPENDIX E

EXCERPTS FROM COMPLAINTS PLEADING CONSTITUTIONAL QUESTIONS.

COPY OF PORTION OF COMPLAINT IN EACH CASE RAISING FEDERAL QUESTIONS.

(5) That the said Caravan Act is in contravention of and repugnant to section 8 of Article 1 (commonly referred to as the "Commerce Clause") of the Constitution of the United States in this:

(a) That said statute places a direct burden upon interstate commerce, and is an attempt, in this respect, on the part of the State of California to regulate interstate commerce.

(b) That the said statute is not and cannot be reasonably interpreted as being a regulatory statute, but is a revenue measure only.

(c) That the said Act is not based upon any reasonable basis of license, but is arbitrary, discriminating and unfair and its purposes and effect is the burdening of interstate and interzone commerce by levying in effect such caravan and license fees only upon operators caravaning into or out of the State of California, or interzone;

(d) That the said Act is in sense a police regulation for the use of the highways of the State or for the protection of the health, morals or safety of the State;

(e) That said Act constitutes an illegal charge upon these plaintiffs for the privilege of engaging in interstate and interzone commerce, which charge, legal or illegal, the State of California has no right to make;

(f) That the charges and fees required of the plaintiffs under said statute are arbitrary, unreasonable and excessive in amount, and bear no reasonable relation to the plaintiffs' use of the highways of the State of California or to the cost of policing such traffic;

(6) That said Act is in contravention of and repugnant to the Fourteenth Amendment to the Constitution of the United States in this:

(a) for the reasons as set forth in paragraph 5, subdivisions (a) to (f) inclusive; and

(b) That it deprives the plaintiffs of property without due process of law, including among other things, monies that the plaintiffs have paid and are about to be required to pay for the use of the public highways of the State of California without due process of law; and in that it deprives plaintiffs of their business of convoying automobiles as herein described without due process of law; and in that it denies to the plaintiffs, while engaged solely in interstate commerce, within the confines of the State of California, as aforesaid, the equal protection of the law;

(c) That it applies only to those persons, firms or corporations using the highways for transportation of motor vehicles for purpose of sale or in caravaning as defined in the statute and does not apply to the other persons using such highways for pleasure or purposes other than sale, or to transporting said motor vehicles over the highway by some other means for the purpose of sale, which distinction and classification is arbitrary and unreasonable;

(d) That said tax and charge is wholly disproportionate to other taxes, fees or other licenses charged by the State of California, either for the registration of vehicles in said state or for vehicles using the highways in said State, or for police regulation thereof;

(e) That said tax and charge is exorbitant and arbitrary and unfair to such a degree that the interstate business in which plaintiffs are engaged in the State of California will return a revenue to the said State in proportion far in excess of other fees, licenses or taxes charged other persons for the use of the highways of said state or for police regulations;

(f) That said statute, unreasonably and arbitrarily, classified the business of these plaintiffs as the transportation of property by caravan, which said classification is arbitrary, unreasonable and discriminatory;

(g) That the said statute complained of herein is not a proper exercise of the police power of the State of California;

(h) That it discriminates further between persons

using the highway entirely within a single zone as defined therein and those using the same highway but continuing on and using other highways.

(i) That it deprives these plaintiffs of their property, to-wit: moneys they are required to pay for the use of the public highways of the State of California, and for police regulations without due process of law;

(j) That it further deprives these plaintiffs of their property, to-wit: of their business of selling and dealing in motor vehicles and of their right to engage in said lawful business, without due process of law;

(k) That it denies to these plaintiffs, when engaged in interstate and interzone commerce in the State of California, as aforesaid, the equal protection of the law;

(l) That it applies only to those persons, firms or corporations using the highways for transportation of motor vehicles for purpose of sale and does not apply to other persons using said highways for pleasure or purposes other than sale, which distinction and classification is arbitrary and unreasonable;

(m) That said tax and charge is wholly disproportionate to other taxes, fees, or other licenses charged by the State of California, either for the registration of vehicles in said state or for vehicles using the highways in said state, or for police regulation.

(n) That said tax and charge is exorbitant and arbitrary and unfair to such a degree that the interstate and interzone business in which plaintiffs are engaged in the State of California will return a revenue to said state in proportion far in excess of other fees, licenses or taxes charged other persons for the use of the highways of said state, or for police regulation;

(o) That said statute unreasonably and arbitrarily classified the business of each of these plaintiffs as far as the transportation of its property is concerned, which said classification is arbitrary, unreasonable and discriminatory.

APPENDIX F

TRIAL COURT OPINION

MEMO OF DECISION

Soon after the Caravan Act (Stats. of 1937, p. 2253; Act 5136, Vol. 2, Deering's California General Laws, p. 1667) went into effect the plaintiff, Harry A. Lord, in an earlier case sued to enjoin the director and another official of the Motor Vehicle Act from enforcing its provisions as to him, and to recover the deposit hereinafter mentioned.

Pursuant to a stipulation entered into in said action, plaintiff paid to the Motor Vehicle Department the fees imposed by the statute upon condition that the same would be retained by said Department "in a special fund pending the final determination in this action on appeal or otherwise of the constitutionality of the aforesaid statute, at which time in the event that the said statute shall be determined to be unconstitutional the sums so paid shall be returned xxx to the plaintiff xxxx and in the event that said statute shall be determined to be constitutional xxx shall be retained by the Department xxxx and shall be applied according to the provisions of the Caravan Act." Continuing jurisdiction was reserved by the court under said stipulation until final disposition of said moneys. Said first action by plaintiff, Lord, was not brought to trial within five years and was dismissed without disposing of said fund. (Lord vs. Ingels, 64 C. A. 2nd 559).

The present action was filed during the pending of the appeal of such first action, and the issue of the disposition of said fund is now pending in the Lord vs. Garland No. 483,633 case above mentioned including the issues as to constitutionality of the act which is presented by each of the other two cases here involved, which have been consolidated here for the purpose of trial.

In the second case the plaintiffs doing business under the fictitious name of the Roy Dial Company, are engaged in the business of buying and selling used cars in Long Beach. In the operation of their business they buy used cars in Arizona, and in the area of Chicago, Illinois, and

transport the same in single units on their own wheels to their place of business in Long Beach, California, in Zone 1, as defined by the Caravan Act of 1937. The Roy Dial Company alleges that it had dealer plates issued by the Department of Motor Vehicles under the Vehicle Code for each of said automobiles so entitling them to move the same upon the highways of the State for the purpose of selling them, but that the defendants ignore such permits and require said plaintiff to purchase a permit for each of said cars under the Caravan Act before permitting such cars to be brought into the State or taken from Zone 1 into Zone 2.

In the third case the plaintiffs, Utility Trailer Sales Company, Utility Trailer Sales Company of San Francisco, a corporation, and Utility Trailer Sales Company of Fresno, Inc., allege that the Utility Trailer Manufacturing Company, Inc. makes trailers in Los Angeles that are to be used in transportation upon the highways of the State and that each of the plaintiffs has a contract with said manufacturing company to sell and market its product in the respective areas in which said corporations do business, i.e., plaintiff Utility Trailer Sales Company has the territory of Southern California and Arizona; that Utility Trailer Sales Company of San Francisco, Inc. has the territory of Northern California including the territory adjacent to San Francisco and Sacramento, California, and that the Utility Trailer Sales Company of Fresno, Inc., has the territory adjacent to the City of Fresno and the San Joaquin Valley, and that each of said plaintiffs takes delivery of the Utility Trailers handled and sold by it, at Los Angeles, California, and transports them on their own wheels to all points in their respective territories and by reason of said Caravan Act they are compelled to pay a Caravan Tax of $15.00 on each trailer handled and sold by it when transported upon its own wheels or in tow of another to any point in Zone 2 as defined by said Caravan Act and to points in Arizona. Said plaintiffs also allege that said trailers were being so made, transported on their own wheels and sold long before the enactment of said Caravan Act, and said plaintiffs also pray for an

injunction permanently enjoining defendants, their officers and employees from enforcing or attempting to enforce as against them the provisions of said Caravan Act.

Section 8 of said Act provides:

> "Sec. 8. The provisions of this Act shall not apply to the transportation of motor vehicles within Zone 1 or between points in Zone 2, which are hereby defined as follows:
>
> "Zone 1. That part of the State of California lying within the counties of San Diego, Imperial, Orange, Riverside, San Bernardino, Santa Barbara, San Luis Obispo, Kern, Inyo and Mono.
>
> "Zone 2. That part of the State of California not included within Zone 1."

Section 3 of the Act provides in part that "No person, firm or corporation shall use any highway in the State for caravaning unless and until there shall first have been secured from the Motor Vehicle Department of the State of California * * * a special permit as to each vehicle so caravaned, for use of the highways of this State in caravaning such vehicles, which permit shall be displayed by posting the same upon the windshield of such vehicle or in other prominent place thereon where it may be readily legible."

The Department apparently construes such sections as requiring the purchase of a permit for any car that comes under the definition of caravaning in Section 1 of the Act to obtain the permit before crossing such imaginary line between the two zones, notwithstanding the very indefinite language of the Act.

The defendants urge that the validity of the Act is established by the cases of Clark vs. Paul Gray, 306 U.S. 583 and Morf vs. Bingaman, 298 U.S. 407. The latter case arose under the laws of New Mexico and it holds that such law did not infringe any constitutional limitation on State power.

The court says "The facts, *as stipulated*, establish that the transportation of automobiles across the State in caravans, for the purpose of sale, is a distinct class of business of considerable magnitude. Large numbers of such cars move

over the highways in caravans or processions. Seventy five to eighty per cent of the cars appellants caravan, are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and brakes of one. Appellants' drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses." (p.p. 410) Up to this point the opinion fairly presents the method used by the plaintiff, Lord, in obtaining and compensating his drivers, except that it does not show the care that the evidence here shows he used to obtain responsible drivers. Continuing on page 411 of the opinion the court says: "The legislature may have concluded as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of State licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increased the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The State has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic."

> "There is ample support for a legislative determination that the peculiar character of this traffic involves a special type of use of the highways, with enhanced wear and tear on the roads and augmented hazards to other traffic, which imposes on the State a heavier financial burden for highway maintenance and policing than do other types of motor car traffic. We cannot say that these circumstances do not afford an adequate basis for special licensing and taxing provisions, whose only effect, even when applied to interstate traffic, is to enable the (412) State to police it, and to impose upon

it a reasonable charge, to defray the burden of this State expenses, and for the privilege of using the State highways."

"2. It is not denied that automobiles moving in caravans, as do appellants', constitute a class of traffic which may be taxed differently from other classes without infringing the equal protection clause. But it is insisted that such is not the classification of the statute. It is said that the statute in terms imposes the special permit fee on every automobile transported for sale, whether moving singly or in a caravan; that when moving singly a car, merely because intended for sale, presents no differences from like cars, moving for other purposes, which would afford any basis for a difference in taxation. But this argument both ignores the actual circumstances in which (407) the statute is applied, as shown by the record and seeks to take advantage of an alleged discrimination which, if it exists, does the appellant no harm."

"There is nothing in the Fourteenth Amendment which requires classification for taxation to follow any particular form of words. If that adopted results in the application of the tax to a class which may be separately taxed without denial of equal protection, those within the class who are called upon to pay the tax cannot complain that the taxed class might have been more aptly defined, or that the statute may tax others who are not within the class. Here it is the practice of transporting automobiles over the highways for purpose of sale which has given use to the practice of moving them in caravans. The use of automobiles for other business purposes, or for pleasure, does not have that result. So far as it appears the movement of single cars is negligible, and it is shown affirmatively that the cars transported for sale by appellant move in caravans. * * * We have no occasion (414) to pass on the validity of the taxes applied to cars driven singly."

Morf v. Bingaman, 298 U.S. 407; 56 S. Ct. 756.

It appears from even a cursory examination of the case that the conclusions reached are based on *stipulated facts* construing the laws of New Mexico.

The case of Clark vs. Paul Gray, Inc., 306 U. S. 583, 47 S. Ct. 702, is an appeal from a judgment of the District Court of the United States, this district, composed of Wilbur, circuit judge, and Cosgrove and Yankwich, both district judges (Yankwich dissenting), held the 1937 Caravan Act void and permanently enjoined its enforcement. The cause was reversed on appeal with instructions to dismiss the case as to appellee, Paul Gray, Inc. on the merits, and to dismiss as to the other appellees for want of jurisdiction in the federal courts.

The Supreme court quotes the language of the case of Morf vs. Bingaman, 298 U. S. 407 at pages 411-412, quoted hereabove. The opinion further says beginning on page 594, "The classification of the traffic for the purposes of regulation and fixing fees is a legislative, not a judicial function. Its merits are not to be weighed in the judicial balance and the classification rejected merely because the weight of the evidence in court appears to favor a different standard ***. The determination of the legislative is presumed to be supported by facts known to it, *unless facts judicially known or proved preclude that possibility.* * * * Hence, in passing on the validity of the present classification, it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. *Its function is only to determine whether it is possible to say that the legislative decision is without rational basis.* This is equally the case where the classification, which is one which the legislature was competent to make, is applied to vehicles using the highways in interstate commerce. The legislature must be assumed to have acted on information available to the courts, and *where, as here, the evidence, like that discussed in Morf vs. Bingaman, supra, shows that it is at least a debatable question whether the traffic in caravans involves special wear and tear of the highways and increased traffic hazards requiring special police control, decision is for the legislative and not for the courts.* * * * (595). *It does not appear, nor is it contended, that this appellee transports any cars singly.* * * *

THE ARGUMENT THAT THE STATUTE DENIES EQUAL PROTECTION TO APPELLEES BECAUSE IT EXACTS FEES FOR CARS TRANSPORTED INTO THE STATE FOR SALE SINGLY BUT NONE FOR CARS WHICH MOVE SIMILARLY INTRAZONE OR FOR THOSE WHICH ENTER THE STATE NOT FOR THE PURPOSES OF SALE, IGNORES THE ACTUAL CIRCUMSTANCES IN WHICH THE STATUTE IS APPLIED TO APPELLEES, AS SHOWN BY THE RECORD, AND SEEKS TO TAKE ADVANTAGE AS AN ALLEGED DISCRIMINATION, WHICH, IF IT EXISTS DOES NO HARM." (Italics Mine).

On page 596 of said opinion the court says "The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can see that it is without any substantial basis."

It will be noted that neither of the two cases cited involve single car operations, and each has expressly excluded such operations as they should have done. The transportation of trucks was not involved in either of them.

Single car operations are involved in the Lord and Dial case concerned here. In the Lord case each caravan was accompanied by a single car intended for sale driven by the man in charge of the caravan and another single car which also was intended for sale by the owner was driven by a mechanic. In the Dial case single cars only are involved, and in the case of the sales companies buying trailers in Los Angeles and transporting the same for sale to points in Arizona or their places of business in Zone 2, are charged $15.00 for each individual trailer transported on its own wheels outside of Zone 1 where it is manufactured.

At the time the Caravan Act of 1937 became effective the evidence shows that the plaintiffs, Lord and Dial were in possession of or entitled to possess special plates upon paying the fee therefor, which entitled them, as dealers or transporters under Sections 205 and 206 of the Vehicle Code of the State of California to operate, or move vehicles on the highway of the State for the purpose of testing, demonstrating, repairing, delivery or selling the same, when such

plates are displayed in the manner provided in Section 158 of the Vehicle Code (one plate in front and the other in the rear.) Such plates were good until midnight on the 31st day of December of each year upon paying a fee of $5.00 for the first set of plates and $3.00 for each additional set of special plates (Section 375 Veh. Code.) The Department refused to permit either Lord or Dial to use such special plates, and compelled them to buy plates under the Caravan Act at $15.00 each.

Such sections were in effect prior to the enactment of the Caravan Act of 1935 and were amended in 1935 (Stats of 1935 pp 119-120 and 121,) and the present Caravan Act was not in effect until July 2, 1937.

Such sections of the Vehicle Code seem to provide a general law that covers the operations performed by the plaintiffs, and also to show that outside of the fee of $7.50 for the use of the highway, (which seems to be a reasonable charge,) that in the opinion of the legislature the additional charge of $7.50 is entirely unreasonable and arbitrary.

Such conclusion is supported by the evidence concerning the origin of the Caravan Act. I am forced to conclude from that evidence that it did not originate in any particularly altruistic or humanistic impulses, or any public demand, but solely through the efforts of "new car dealers and the railroads" who wanted (1) to stop strong competition on the part of second-hand dealers, who appeared to be selling very fine looking used cars, and (2) to recapture the business of transporting cars by rail. Chief Cato frankly said that it was such "new car dealers and the railroads" that put "the heat" on the Department to enforce the Act, and were active in framing the legislation.

I do not find anything in the evidence taken here to support the conclusion of the trial court, as related on page 411 of the opinion in the case of Morf v. Bingaman, 298 U. S. 407, and reiterated in the case of Clark v. Gray, 306 U. S. 583-749, with all due respect to the justices of that court.

I cannot find from the evidence here that the drivers of caravan cars had little interest in the vehicles they drive, nor any less regard than those of state licensed cars for the safety and convenience of others using the highway. They were certainly interested in protecting themselves from

injury. Nor can I find that cars thus coupled and controlled frequently or otherwise, skid, either on curves or elsewhere, or that they cause any more wear and tear on the roads than any other single car, and no more when they are driven in doubles; nor that there were any increased difficulties in the operation of the coupled cars; nor that the length of the caravans to any appreciable degree increased the hazard and inconvenience to passing traffic; nor can I find from the evidence here that such traffic involved a special type of use of the highways which enhanced the wear and tear on the roads, nor that it augmented the hazards to other traffic; nor that they imposed on the state a heavier financial burden for highway maintenance and policing than do other types of motor traffic. There is no evidence of this at all in my opinion.

We have the benefit of the evidence of Chief Cato who appeared before the committee of the legislature that was supposed to have investigated the traffic in 1935. He did tell us that in the early days of the traffic the cars were traveling too close together, but the Vehicle Code, Section 531, prohibits the driver of a motor vehicle from following another vehicle "more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon, and the condition of the roadway", and prohibits the driver of any motor truck or motor truck drawing another vehicle when traveling upon the roadway outside of a business or residential district from following within 300 feet of another motor truck or one drawing another vehicle. He tells of one caravan being caught on a grade in a snow storm. This created a traffic jam that had to be straightened out, but the whole matter was governed by the Vehicle Code, regardless of whether the cars were being caravaned or not, and that is true of most of the complaints even in the early days. There were several instances related that were violations of the provisions of the Vehicle Code for which the car or cars were stopped and upon investigation and finding that they were intended for sale, a mechanical warning was given to be cleared at the first station at which caravan permits could be bought, and no warrant was issued for the arrest of the driver for the Vehicle Code violation. The Chief was frank to admit that

the operators of the single caravan cars gave them no more concern than the ordinary passenger car.

There is evidence that a few caravan cars were speeding. That, however, is not a peculiarity that differentiates caravaning from other traffic on the highway, and Section 510 of the Vehicle Code prohibits it. Several of the cars were stopped because of that and found to be caravan cars, some equipped with permits and some not. Those which were not were given a mechanical warning and waived on their way. There were a few instances of driving on the wrong side of the road, a violation of Section 525 of the Vehicle Code. Being driven in such a way is not something that distinguishes a car being caravaned from a car that is not so driven. One car being caravaned was driven by an intoxicated driver, but that is not a condition that appears only in the drivers of such cars.

Some cars were stopped because of defective lights or brakes, and this was true of some trucks, (surplus Army equipment bound for Chicago stopped at Yermo) that had no windshields and were otherwise in an unsafe condition to operate on the highway. The Vehicle Code covered all such things. (Sec. §§ 615, 618, 621, 670, 674, 675, 679 and 680 of the Vehicle Code, which two latter sections authorize any member of the California Highway Patrol to stop and inspect any vehicle or combination of vehicles not equipped as required by the Code, and to do just what the officer stopping such equipment did, require that such vehicles and their equipment be placed in a mechanical condition to conform to the Vehicle Code. In doing what he did the officer simply enforced the provisions of the Vehicle Code. The fact that he sold the man in charge of the trucks caravan permits, which took but a few minutes did not make the work he did under the Vehicle Code chargeable to "expense of enforcing the Caravan Act," in my opinion.

Some of the Utility trailers were stopped because they did not have rear view mirrors, which the Vehicle Code required on such vehicles (§ 674), but such lack of necessary equipment, or defective equipment was not a condition peculiar to caravaned vehicles alone, and certainly did not create, nor tend to create a class distinct or different from

the ordinary vehicle having the same defect or lack of equipment.

In at least one instance shown by the evidence the driver of a car that was *not* being caravaned negligently disabled a car being caravaned, through no fault of the driver of the car so being caravaned.

The record of the insurance carriers of the cars being caravaned by plaintiff Lord speaks eloquently to the fact that caravaned vehicles are no problem in creating an unsafe condition of the highways of the state. (Plaintiffs' Exhibit 36).

The 92nd and 93rd fiscal years from July 1, 1940, to June 30, 1942, shows 14,460 and 14,242 caravan permits respectively sold, a greater number than were sold in any other successive two years according to the records of the Department (Plaintiffs' Exhibit 3) with the exception of the 98th fiscal year, from July 1, 1946, to June 30, 1947, which apparently is due to an unusual condition resulting from the sale of surplus war vehicles, which were brought and moved from army posts over the highways of the state to markets within the state in both Zones 1 and 2, and therefore do not show a normal year. If we take the number sold in the 92nd fiscal year of 14,460 permits, we have that as a fair average sold for the year 1941. Plaintiffs' Exhibit 24 shows that in the year 1941, 636,390 foreign registered passenger automobiles entered the state, exclusive of trucks, local cars and stages. No segregation is made as to cars being caravaned, and I will assume that many of the caravaned cars that bought permits did not enter the state but purchased permits to use the highways to leave the state by land or sea or to move from one zone to another, but for the purpose of comparison we will assume the larger total as entering the state, viz 14,460. Comparing that number with the total passenger cars entering the state, 636,390 shows the ridiculousness of assuming that the less than 15,000 cars caravanned made any noticeable burden, either in wear on the highways, or the cost of patrolling, or the policing of them.

It appears that the most of the sales were through applications made at the offices of the Department rather than through the efforts of the patrolmen.

Nor does the evidence in this case support the conclusion that the cost to the Department of administering and enforcing the 1937 Act is $9.50 per vehicle; nor that the expense involved in issuing caravan permits is about $5.00 a car, or anything like it, or that the cost of policing is anything like $5.00 a car.

There is no evidence as to the cost of printing of permits, but the evidence here shows that a few cents only is the cost of issuing the permits. I am forced to the conclusion from the evidence introduced here that outside of the warnings re driving too close together, which it would seem to me is the duty of each patrolman under the Vehicle Code, and would be an infinitesimal amount to each car so warned, even in the early days under the Act of 1935, and is amply covered by the provisions of the Vehicle Code.

All of the patrolmen who were examined as to it, testified that "singles" created no more hazard than any other single car and that would seem very reasonable, as it seems passing strange that the state of mind of an intended use of the car by the owner when it reached its destination could in any way effect the road or the manner in which a car was driven.

I have called attention to Section 8 of the Caravan Act which divides the State into two zones. Just a look at the map showing the zone line (Plaintiffs' Exhibit 35) is a good demonstration of the arbitrary nature of its creation in my opinion. It is involved in the cases of the Utility Sales Corporations only. One of them has as its sales territory, Southern California and Arizona, in zone one and must pay $15.00 for each trailer transported on its own wheels on the trip to Arizona or into zone two. It is about 265 miles from Los Angeles to Yuma, and about 226 miles to Blythe and that distance can be covered by trailers transported on their own wheels without cost, but if they are taken into Arizona to be sold, they are required to pay $15.00 each for taking them out of the State. The Sales Corporation in Fresno can take its trailers from Los Angeles to the zone line, approximately 150 miles without cost, but pays $15.00 for each trailer so transported across the imaginary line on its own wheels and the San Francisco Sales Corporation

can drive its trailers approximately 250 miles without cost and then has to pay $15.00 for each trailer for a permit to cross such imaginary line on its own wheels on the way to said Corporation's place of business. Those costs must be figured in any sales made that might be in competition with trailers made and sold in Zone 2, and is an undue burden upon the seller of the trailers so brought across the imaginary line. There is no more wear and tear on the highways in either case than with any other trailer of the same weight, nor any more policing required either. As a matter of fact, the evidence shows that no permits were required by the Department until one of the present cases was filed and complaint was made that the Utility Trailers were not required to have permits to cross the zone line.

The only *policing* that appears to have been done was required by the provisions of the Vehicle Code, not anything that differentiated a caravaned vehicle from any other similar vehicle. Section 6 of the Act provides that nothing therein should exempt the owner or operator of a "caravaned vehicle from compliance, except with respect to fees and license charges, with all laws of this State now or hereafter adopted relating to safety in the use of public highways." Any *policing* done in that regard is done under the provisions of the Vehicle Code. Section 7 of such Act provides that "The money from fees so derived by the State from the sale of permits are intended as *compensation for the privilege of using the highways of this State, and to reimburse the State Treasury for the added expense and the State may incur in the collection of such fees and in the administration and enforcement of this Act and the expense of policing the highways over which such caravaning may be conducted.*" (Italics mine.) The Director of the Department has tried to get the employees in any way connected with work connected with caravaning, to segregate their time so that the records of the Department would show what part of their time was actually spent in connection with enforcing the Act, as compared with their duties under the Vehicle Code, but there are no such records kept, so far as the evidence here shows, and I am forced to the conclusion

from all the evidence introduced herein that the patrolmen have found it an impossible job, or that it made such an impossible showing so far as comparing it with the time spent in enforcing the provisions of the Vehicle Code, that it was not done.

Submitted with the merits of the case was the evidence which plaintiffs offered in the form of several depositions of dealers whose sales territories are split by the imaginary line zoning the State. An objection was made by the defendants to this evidence on the ground that none of the plaintiffs here are in like position and hence cannot complain if the Act is not enforced as to such dealers. I will sustain the objection to the use of the evidence contained in such depositions. I have heretofore shown the ridiculously arbitrary situation arising in the case of the Utility Sales Corporation of Fresno and San Francisco so far as the zone line is concerned, and so far as the State boundary between Southern California and Arizona is concerned, and those situations, in my opinion, on principle, raise the same state of facts.

If my recollection is correct, I think the witness, Officer Smith, testified in effect that the Utility trailers as moved on the highway, created no more hazard than the ordinary truck and trailer, and that is the only conclusion that I can reach under the evidence.

I am forced to conclude from the evidence here that the classification adopted by the Legislature is without any substantial basis and that the evidence introduced here shows an arbitrary attempt on the part of the Legislature, not justified by the facts, to fix an arbitrary amount as a tax that bears no relation at all to the actual cost of enforcing the Act and that the Act is void under the cited provisions of both the State and Federal constitutions in each of the three cases consolidated here for trial.

It is further ordered that defendants' pending motion for an order disposing of the moneys in the said special fund in defendants' hands, is denied, and it is further ordered that the defendants return to plaintiff in the case of plaintiff

Harry A. Lord, the moneys he deposited in said special fund, or its equivalent.

Attorney for plaintiffs will prepare findings of fact in each case.

Dated this 9th day of Nov., 1948.

HARRY R. ARCHIBALD,
Judge.

(Endorsed): No. 483633. No. 530371. No. 540016. Memorandum of Decision. Filed Nov. 9, 1948.

W. G. SHARP,
County Clerk.
By R. L. BARTLETT,
Deputy.

(9828)

Office - Supreme Court, U. S.
FILED
JAN 23 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 557

HARRY A. LORD, ROY DIAL, BERTHA H. DIAL, ET AL.,

Appellants,

vs.

A. H. HENDERSON, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDMUND G. BROWN,
Attorney General of California,
FRANK W. RICHARDS,
Deputy Attorney General of California,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 557

D.C.A. Nos. 17237 and 17238

HARRY A. LORD,

vs. *Plaintiff and Appellant,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

D.C.A. No. 17239

ROY DIAL, ET AL.,

vs. *Plaintiffs and Appellants,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

D.C.A. No. 17240

UTILITY TRAILER SALES COMPANY, a Corporation, ET AL.,

vs. *Plaintiffs and Appellants,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

APPELLEES' STATEMENT OPPOSING JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENTS.

Appellees respectfully present the following matters making against the jurisdiction of this honorable court asserted by appellants.

Statement of Case

The plaintiffs in actions Nos. 17238, 17239 and 17240 filed a complaint in the Superior Court of Los Angeles County, State of California, to enjoin the enforcement of a statute, Chapter 788, Statutes of 1937, page 2253, of the State of California. The actions were consolidated for trial, and following a lengthy trial thereof the court declared the statute unconstitutional. The defendants appeaied and the District Court of Appeal of the State of California, Second Appellate District, Division One, held the statute constitutional and reversed the judgments of the lower court with instructions to the trial court to enter judgments for the defendants and to enter an order in cause No. 17237 directing that the moneys (apparently in the sum of $86,177.50) now held in a special fund by the Department of Motor Vehicles be paid into the State Treasury. (*Lord* v. *Henderson*, 105 A.C.A. 535, 106 A.C.A. 6, as amended on petition for rehearing; 234 Pac. 2d 197.) The Supreme Court of California denied a hearing. (37 A.C. No. 24, p. 761 (1).)

The statute involved is commonly known as the "Caravan Act." It requires a special permit of the Motor Vehicle Department, for the issuance of which a fee of Fifteen dollars is exacted, to transport any vehicle subject to registration under the Vehicle Code on the highways of California on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser, whether such agent, dealer, purchaser or prospective purchaser may be located within or without the State. The statute divides the State into two zones and exempts the procurement of such permit if the transportation is confined to points within a single zone. The fee paid for any caravaning permit is in lieu of all

other registration and license fees for the use of public highways in this State during the period that such vehicle is operated in accordance with the permit, which is valid for a period of six months after date of issuance. Seven and fifty one-hundredths dollars ($7.50) of said fee is compensation for the privilege of using the public highways of this State and the remaining seven and fifty one-hundredths dollars ($7.50) of said fee is to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation. All of said fees collected shall be paid into and become a part of the Motor Vehicle Fund in the State Treasury.

Jurisdictional Question

A final judgment or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court of the United States where is drawn in question the validity of a State Statute on the ground of its being repugnant to the constitution of the United States and the decision is in favor of its validity. (Title 28 U.S.C.A. sec. 1257.)

Lord v. Henderson, Action No. 17237

In *Lord* v. *Henderson*, District Court of Appeal No. 17237, this action was dismissed in 1942 under section 583 of the Code of Civil Procedure for failure of plaintiff to bring the same to trial within five (5) years after the filing thereof. The order of dismissal was affirmed on appeal. (*Lord* v. *Ingels*, 64 Cal. App. 2d 559.) The order entered therein directing the moneys (apparently in the sum of $86,177.50), which were caravan fees paid by Lord and which are now held in a special fund by the Department of Motor Vehicles pending the determination of the consti-

tutionality of said statute in action No. 17238, be paid into the State Treasury is not a judgment or decree that is appealable under section 1257 of Title 28, U.S.C.A. Therefore, the appeal in this action should be dismissed by this honorable court. The execution of said order has been stayed by the District Court of Appeal pending the appeal in *Lord* v. *Henderson*, action No. 17238.

Lord v. Henderson, Action No. 17238

The validity of said statute as against the assaults made thereon by appellant Lord in action No. 17238 was upheld by this honorable court in the following case:

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744.

The validity of a similar statute of the State of New Mexico was upheld by this honorable court in the following case:

Morf v. *Bingaman*, 298 U. S. 407, 56 S. Ct. 756.

Roy Dial, et al., v. Henderson, and Utility Trailer Sales Co., et al. v. Henderson, Actions Nos. 17239 and 17240

The validity of said statute as against the assaults made thereon by these appellants is sustained by decisions of this honorable court in the following cases:

Clark v. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 703;
Packard v. *Banton*, 264 U. S. 140, 44 S. Ct. 257, 259;
Hodge Drive-It-Yourself, et al., v. *City of Cincinnati, et al.*, 284 U. S. 335, 52 S. Ct. 144;
Dixie Ohio Express Co. v. *State Revenue Com.*, 306 U. S. 72, 59 S. Ct. 435;
Aero Mayflower T. Co. v. *Georgia Pub. Serv. Com.*, 295 U. S. 285, 55 S. Ct. 709;
Capitol Greyhound Lines v. *Brice*, 339 U. S. 542, 70 S. Ct. 806.

"The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Rule 7, par. 4, Supreme Court Rules.

". . . when the questions presented on such a motion are found by the court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case."

City of Boston v. *Jackson*, 260 U. S. 309, 43 S. Ct. 129, 113.

". . . that the Federal question thus suggested had been so explicitly foreclosed by previous decisions as to leave no room for real controversy."

Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 25 S. Ct. 750, 753.

"From the analysis just made, it results that although a Federal question was raised below in a "formal manner, that question, when examined with reference to the *averments of fact* upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit." (Emphasis added.)

Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 125.

Averments of Fact

Plaintiff Lord in action No. 17238, avers in his complaint for injunctive relief against the enforcement of the statute

as to him that he is engaged in the business of caravaning automobiles from various eastern states, such as Indiana, Michigan and Illinois, into the State of California for distributors and dealers in automobiles doing business in the State of California, and that the defendants have demanded and received of plaintiff fees for caravaning cars and will continue in the future to demand and receive such fees pursuant to the terms and provisions of Chapter 788, Statutes of 1937, of the State of California.

Plaintiffs Dial, et al., in action No. 17239, aver in their complaint for injunctive relief against the enforcement of the statute as to them that they are in the business of dealing in used cars in the City of Long Beach, California, under the fictitious firm name of "The Roy Dial Company"; that the company buys cars in Arizona and Illinois and transports them singly on their own wheels and under their own power into California for the purpose of sale; that each is a passenger type automobile and bears license plates of the state from which it is transported, and that defendants demand that plaintiffs pay caravan fees on each automobile thus transported under and by virtue of Chapter 788, Statutes of 1937, of the State of California.

Plaintiffs Utility Trailer Sales Company, a corporation, et al., in action No. 17240, aver in their complaint for injunctive relief against the enforcement of the statute as to them that they sell and market the products of the Utility Trailer Manufacturing Company, Inc.; that they take delivery at Los Angeles and transport trailers, the products of the manufacturing company, upon their own wheels to points in Arizona and Northern California out of Zone 1 as defined by Chapter 788, Statutes of 1937, of the State of California, as amended, and that said statute is being enforced by defendants against plaintiffs.

Averments of Law

Plaintiffs in each action aver that said statute is unconstitutional in that it is in contravention of and repugnant to section 8 of Article I (Commerce Clause) and the Fourteenth Amendment of the Constitution of the United States.

The grounds alleged by plaintiffs why said statute is in contravention of and repugnant to the commerce clause are (a) it places a direct burden upon interstate commerce and attempts to regulate it, (b) it is not a regulatory statute but a revenue measure only, (c) it is not based upon any reasonable basis of licenses but is arbitrary, discriminatory and unfair, (d) it is in no sense a police regulation of the use of the highways of the State of California or for the protection of health, morals or safety of the State, (e) it constitutes an illegal charge for the privilege of engaging in interstate commerce, and (f) the charges and fees under said statute are arbitrary, unreasonable and excessive in amount.

The grounds alleged by plaintiffs why said statute is in contravention of and repugnant to the Fourteenth Amendment of the Constitution of the United States are (a) deprives plaintiffs of property without due process of law and denies them equal protection of the law in that it applies to persons, firms and corporations using the highways for the purpose of sale and not to others who use the highways for pleasure or for purposes other than sale, which distinction and classification is arbitrary and unreasonable, (b) the fee charged is disproportionate to other fees charged by the State of California, either for the registration of vehicles or for using the highways, and is exorbitant, arbitrary and unfair, and (c) it discriminates between persons using the highways entirely within a single zone and those using the same highways but continuing on and using other highways.

ARGUMENT

I

(a) The Law Is Settled That Caravaning, the Business Engaged in by Plaintiff Lord, Constitutes a Special Class of Traffic Which May Be Taxed or Charged Differently from Other Classes of Highway Traffic.

In *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744, this honorable court held that this statute (Ch. 788, Statutes of 1937, of the State of California), did not impose a forbidden burden on interstate commerce or infringe the due process or equal protection clauses of the Fourteenth Amendment. The evidence showed (59 S. Ct. at page 751(17)) that Paul Gray, Inc., caravans its cars for sale in California from Detroit, Michigan, and St. Joseph, Missouri, and that its cars move in caravans of from nineteen to twenty-five cars. The court said, "From what has been said it is evident, as was decided in *Morf* v. *Bingaman*, *supra* (298 U. S. 407), that cars moving in caravans of the type described constitute a special class of traffic which may be taxed or charged for differently from other classes without infringing the equal protection clause."

In *Morf* v. *Bingaman*, *supra*, (298 U. S. 407, 56 S. Ct. 756, at page 758) the court stated:

> "The facts, as stipulated, establish that the transportation of automobiles across the state in caravans, for the purpose of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the highways in caravans or processions. Seventy-five to eighty per cent. of the cars in appellant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and

brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The Legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic."

(b) The Evidence in the Lord Case Set Forth in the Decision of the District Court of Appeal, Establishes the Fact That the Drivers Are Casually Engaged, That Caravans Increase the Inconvenience and Hazard to Passing Traffic and That Cars Coupled Together Often Have a Tendency to Skid, Sway out of Line, or to Jack-Knife When Compelled to Stop Suddenly.

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 S. Ct. 220, 221, this honorable court stated relative to its jurisdiction to review the proceedings of the state courts:

". . . Nor does this court sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court."

The facts found by the District Court of Appeal as to Lord's use of the highways are as follows:

". . . Lord caravans passenger motor vehicles, generally in pairs, i.e., a lead car and a car in tow-tandem style. The tandem is propelled by the lead car in which the driver sits. Usually the caravan or fleet of these tandem-hookups aggregates ten or so tandems (20 cars) plus a single car for the manager of the fleet and a single follow-up car driven by a mechanic. The cars for the most part are gathered at Detroit, Chicago, and Kansas City and are then driven overland to the principal coast cities of California. The drivers are recruited through want ads in newspapers at the point from which the trek originates. These want ads offer free motor transportation to California with meals and lodging en route together with $25.00 to $50.00 to the drivers for the services rendered.

". . .

"Most of the drivers engaged by many caravan operators to caravan vehicles have never been in California and are wholly unfamiliar with mountain driving encountered on their route in this state. In many instances they are under age and often below the age required for an operator's license in California. The drivers generally do not have California operator's licenses and quite often no licenses from any other state. By proceeding in a caravan or as a fleet, the manager and mechanic can keep a check that would not otherwise be possible. If one car becomes disabled the whole fleet stops on or alongside the road so that the mechanic can repair the car or attach it to some other car in the fleet. The necessity of driving the cars in a fleet tends to keep one tandem after another rather closely together. On a two-lane highway, and there are several at the boundaries of the state, cars behind the fleet necessarily encounter difficulty in getting ahead of the fleet as a whole or in between the various tandems. It seems quite probable that the recruit drivers of the tandems oftentimes are not inclined to be very courteous to other cars on the highway, as for instance to aid them in passing or enable them to get into the line when necessary to avoid oncoming cars.

> When the tandem cars are compelled to stop suddenly, there is often a tendency to skid, to sway out of line or to 'jack-knife,' because the brakes on the forward car must alone serve for both cars. The front part of the towed car, including the windshield, is usually covered up so as to avoid mud and rains thrown back and upon it by the lead-car. This procedure naturally obscures the vision of a driver behind such a tandem as he can only see cars ahead of the tandem by looking out of his own left window."

It is clear that caravaning, as engaged in by plaintiff Lord, constitutes a special class of traffic which may be taxed or charged differently from other classes of highway traffic.

II

The Law Is Settled That the Use of Highways Such as Engaged in by Plaintiffs Roy Dial et al., and Utility Trailer Sales Company, et al., Constitutes a Special Class of Traffic Which May Be Taxed or Charged Differently from Other Classes of Highway Traffic.

The facts found by the District Court of Appeal as to the use of the highways by plaintiffs Roy Dial, et al. and Utility Trailer Sales Company, et al., are as follows:

> "The plaintiff Dial is a used car dealer with his principal place of business at Long Beach. As a part of his business operations he buys passenger-type automobiles in Chicago and causes them to be driven on their own wheels, with their foreign license plates, to Long Beach by drivers who are procured through ads in Chicago newspapers. Except in rare instances the automobiles are not driven in caravans or convoys. The drivers receive no pay and, what is more, are required to pay for their own lodging and meals together with the gasoline and oil used by the particular vehicles

driven by them. There was evidence that such drivers took the minimum time for sleep en route.

"The three plaintiff corporations Utility Trailer Sales Company (of Los Angeles), the Utility Trailer Sales Company of San Francisco, and the Utility Trailer Sales Company of Fresno are all engaged in selling the products of a manufacturer of commercial truck trailers and vans known as Utility Trailer Manufacturing Company. The sales companies all take delivery of the truck-trailers or vans at Los Angeles and then transport them on their own wheels in tow of another vehicle to their respective warehouses or sales rooms. The trailers or vans are of various sizes weighing when empty between 4,000 and 18,000 pounds. As a rule, it is not practicable to transport these trailers or vans by railroad because of their size, the cost of transportation and lack of cranes to unload them and hence they must be driven to their destination on the highways. They are not driven in caravans, except in rare instances.

". . .

"Unquestionably, the operation of a single passenger-type vehicle or of two such cars driven tandem is not as hazardous, as when driven as a part of a large caravan, fleet or convoy or as is the case of two large trucks or vans driven tandem. Nevertheless, the operation by Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan. However, Dial's drivers receive no pay whatever for their services nor do they receive lodging and food, and, what is more, must furnish such costs out of their own pockets, all of which is not true in the plaintiff sales companies, except that case of Lord. Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord, as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do.

"But quite apart from these differences in fact it

is obvious that the State may impose the caravan tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper." (234 Pac. 2d at pages 200, 202 and 203.)

In *Clark* v. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 703, it is said:

". . . The highways are public property. . . . Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep."

In *Packard* v. *Banton*, 264 U. S. 140, 44 S. Ct. 257, 259, it is said:

". . . The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purpose of gain is special and extraordinary, and, generally, at least, may be prohibited or conditioned as the Legislature deems proper."

In *Hodge Drive-It-Yourself Co., et al.* v. *City of Cincinnati, et al.*, 284 U. S. 335, 52 S. Ct. 144-145, it is said:

"Unquestionably appellants contemplate that those hiring their cars will operate them upon the streets. In fact, such use of the streets is essential to appellants' business. It is a special and extraordinary use materially differing from operation of automobiles or trucks by owners or their chauffeurs in the usual way for private ends. The running of automobiles necessarily is attended by danger to persons and property in the vicinity; and, when they are negligently driven upon city streets, the peril is great. The court below found that the operation of automobiles by such hirers is extra-hazardous to the public. The state has power for the safety of the public to regulate the use of its public highways. (Citing authorities.) It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business."

As to plaintiffs Dial, et al., the decision of the District Court of Appeal, as we have heretofore pointed out, states that, "Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord, as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do."

As to plaintiffs Utility Trailer Sales Company, et al., who transport on their own wheels on the highways large commercial trucks and vans in tow of another vehicle from Los Angeles to Fresno, San Francisco and Arizona, it is axiomatic that this operation is extra-hazardous and causes extra wear, tear and upkeep of the highways.

It is clear that the operations engaged in by these plaintiffs constitute a special class of traffic which may be taxed or charged differently from other classes of highway traffic.

III

The Fee of $15.00 for the Declared Purposes Is Not Arbitrary, Unreasonable or Excessive in Amount

In *Clark* v. *Paul Gray, Inc.*, supra (59 S. Ct. at page 753 (24)), the court, in considering the reasonableness of the $15.00 fee exacted by the statute, said:

> "Here a fee of $7.50 is collected for administration and enforcement of the Act and a fee of like amount is charged for the use of the highways. Appellees have offered no proof that either of the fees is too large, although the burden rested upon them to show that the fees were excessive for the declared purposes. (Citing authorities.)
>
> ". . .
>
> "(27) The trial court seems to have thought, as appellees argue, that unreasonableness of the fees was established by proof that the same fees are not imposed on other classes of traffic. But since, as we have seen,

there is basic for the classification of the traffic, there is basis for a difference in fees charged the different classes. (Citing authorities.)"

The decision of the District Court of Appeal states:

". . . In that connection it needs to be observed that the Caravan Act tax is in lieu of all other taxes policing or otherwise so long as the vehicle taxed is not sold or exchanged during the six-month period and entirely regardless of the mileage covered by the vehicle over the state highways or any other factor. To illustrate how this can redound in favor of a caravan taxpayer as against a registered car owner, let us review the status of each at the end of five months. If a passenger vehicle is purchased for $3,000.00 in the Middle West and brought into the state and registered in January the registered owner must pay a license tax of $6.00, Vehicle Code, sec. 370, and an additional property tax of about $60.00, Rev. & Tax Code, sec. 10752. If he brings the car into the state and has it registered in June he pays only 7/12 of these amounts or a total of $38.50. In the case of a caravan owner he pays a caravan tax of only $15.00 if the vehicle is brought into the state in January and if it is sold and registered in June the purchaser pays only a tax of 7/12 of 66.00 or $38.50. Hence the charge against the car in the latter case for the caravan and registration fee is only $53.50 for the entire year as against a charge of $66.00 against the registered owner for the same length of time. This most certainly is not discrimination against caravaned vehicles.

". . .

"The record before us does not disclose the initial cost expended by the State for the highways used by the respondents or the maintenance thereof, nor the separate cost of policing the caravaning thereon or of administering the Caravan Act, with respect to these highways separate and apart from the Motor Vehicle Act. What is plainly shown is that the economic saving of the use of highways by the respondents over the use

of other modes of transportation exceeds many times over the cost either the policing license fee or the use of the highways. So viewed, we fail to see that either fee is excessive or discriminatory and we see no basis whatever for holding either to be unconstitutional upon any of the grounds assigned."
(234 Pac. 2d at page 206.)

IV

The Statute Does Not Discriminate Between Persons Using the Highways Entirely Within a Single Zone and Those Using the Same Highways But Continuing on and Using Other Highways.

In *Clark* v. *Paul Gray, Inc., supra* (59 S. Ct. at pages 751 and 752), the court, in construing the statute relative to its zoning provision, said:

". . . It was for the legislature to consider and decide whether the actual conditions which prevail in the state, affecting movement of cars for sale, eliminate or so reduce the burden of the caravan traffic on the highways as to call for a different classification of the short haul traffic for the purposes of regulation and fees. The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it is without any substantial basis. (Citing authorities.)

"The trial court found that cars are often moved in convoys in Zone 1, which includes the metropolitan area of Los Angeles, and it thought this sufficient to establish an unlawful discrimination without consideration of the other conditions affecting the intrazone traffic. The evidence "establishes, beyond any reasonable doubt, that the movement intrazone of cars for sale in convoys similar to that of appellees is negligible and that the principal sources of cars for

sale moving intrazone are the assembly plants of automobile manufacturers located in or near the metropolitan areas of Los Angeles and San Francisco."

As to the claim of plaintiffs herein that the Caravan Act discriminates against transporters and dealers having dealer plates who transport cars from without to within the state in favor of dealers who transport cars intrazone, the District Court of Appeals stated in its decision:

"The reason for exempting dealers or transporters from the operation of the caravan tax so long as they restrict their operations within a single zone is obvious. (Citing authority.) Dealers, as is well known, tend to confine their activities, of selling and demonstrating their vehicles to very limited areas, because of competitive and other conditions. In the case of heavier equipment such as large trucks, vans, and the like, an even lesser use is made of the highways due to the fact that buyers of such equipment generally do not require demonstrations of the equipment on the highways before making a purchase. However, such purchasers often come from "a distance or require delivery of the equipment to distant points within the state. But again the use of the highways of the state is quite negligible. Moreover, sales by such dealers lead to prompt registration of the vehicles and the payment of registration fees and quite substantial property taxes." (234 Pac. 2d at pages 204, 205.)

V

The Fees Collected Become a Part of the Motor Vehicle Fund in the State Treasury

Section 7 of the Caravan Act provides:

"All fees from the issuance of permits provided for under this act shall be collected by the Motor Vehicle Department. Such fees shall be paid into and become

a part of the Motor Vehicle Fund in the State Treasury."

Section 777 of the Vehicle Code provides:

> "Such moneys in the Motor Vehicle Fund as are appropriated in the Budget Act or any other appropriation act for the support of or expenditure by the departments of Motor Vehicles and California Highway Patrol shall be expended by the departments in carrying out the provisions of this code and in enforcing any other laws relating to vehicles or the use of highways."

Section 781 of the Vehicle Code provides for the transfer of unappropriated moneys at a certain time from the Motor Vehicle Fund to the Highway Users Tax Fund.

Section 2101 of the Streets and Highways Code, added in 1947, provides:

> "All moneys in the Highways Users Tax Fund and hereafter received in said fund are appropriated for the acquisition of rights of way for, and the construction, reconstruction, improvement, and maintenance of, public streets and highways subject to and in accordance with the provisions of this code."

Conclusion

Appellees move for a dismissal of the appeal in action No. 17237 on the ground that said appeal is not from a judgment or decree which draws in question the validity of a State statute.

Appellees move for a dismissal of the appeal or an affirmance of the judgment in actions Nos. 17238, 17239 and 17240 on the ground that the questions presented have been so explicitly foreclosed by previous decisions of this honorable court as to leave no room for real controversy.

and are so wanting in substance as not to need further argument.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of California;
FRANK W. RICHARDS,
Deputy Attorney General,
Attorneys for Appellees.

FILED
JAN 29 1952
CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

October Term, 1951

No. 557

HARRY A. LORD, ROY DIAL, BERTHA K. DIAL, KENNETH W. NOWLING, and H. B. NOWLING, doing business under the fictitious name and style of the ROY DIAL COMPANY, UTILITY TRAILER SALES COMPANY, a corporation, UTILITY TRAILER SALES COMPANY OF SAN FRANCISCO, INC., a corporation; and UTILITY TRAILER SALES COMPANY OF FRESNO, INC., a corporation,

Plaintiffs and Appellants,

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

Appellants' Brief Opposing Motion to Dismiss Appeal or Affirm the Judgments.

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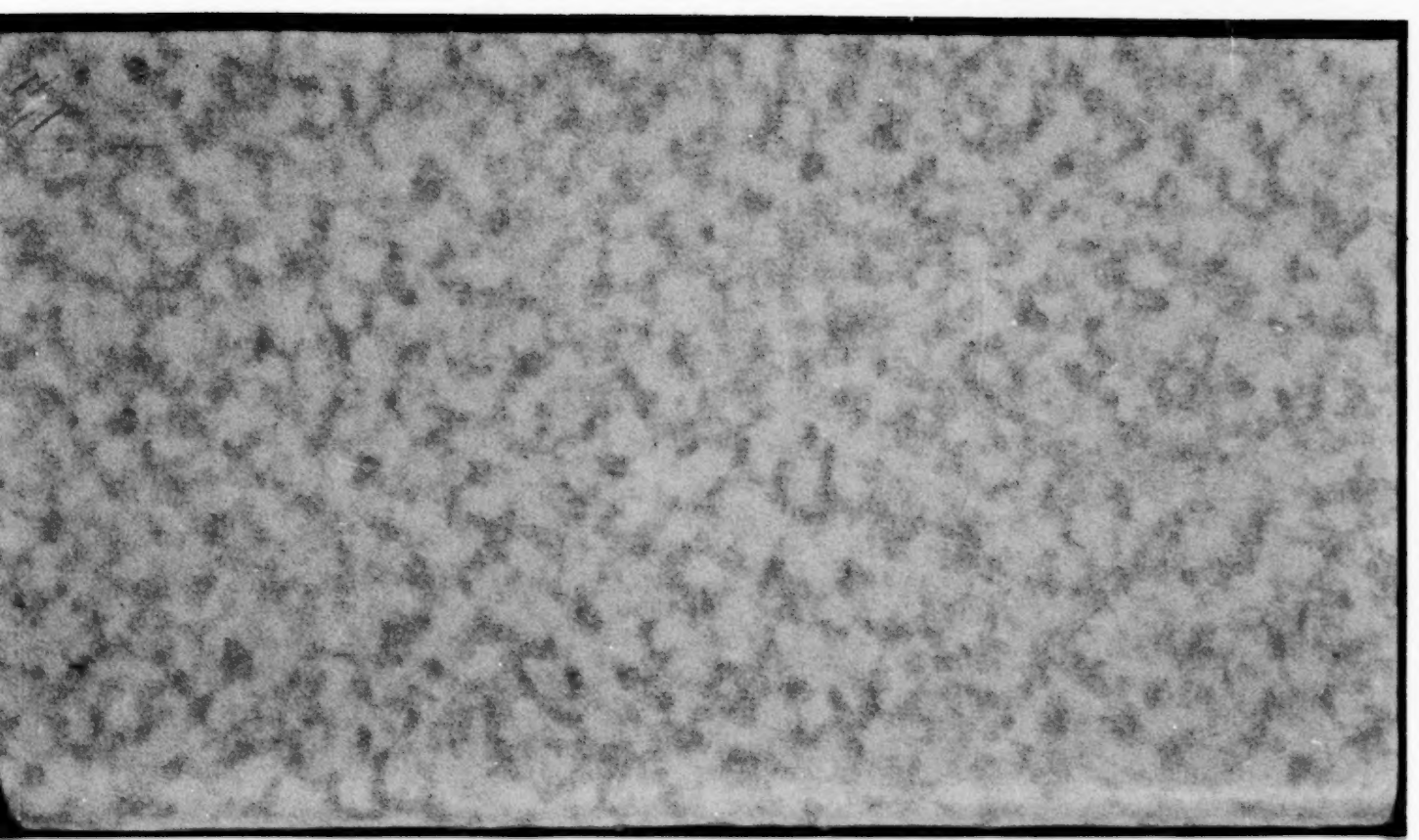

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IN THE

Supreme Court of the United States

October Term, 1951

No. .....

HARRY A. LORD, ROY DIAL, BERTHA H. DIAL, KENNETH W. NOWLING, and H. B. NOWLING, doing business under the fictitious name and style of the ROY DIAL COMPANY, UTILITY TRAILER SALES COMPANY, a corporation, UTILITY TRAILER SALES COMPANY OF SAN FRANCISCO, INC., a corporation; and UTILITY TRAILER SALES COMPANY OF FRESNO, INC., a corporation,

Plaintiffs and Appellants,

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

Appellants' Brief Opposing Motion to Dismiss Appeal or Affirm the Judgments.

Approaching each of the several consolidated cases, and the argument thereon, in the manner and order adopted by Appellee in its Statement Opposing Jurisdiction Including Motion to Dismiss Appeal or Affirm the Judgments, Appellants respectfully present the following observation, authorities, and argument in support of this Honorable Court's jurisdiction and duty to fully consider and decide the appeal herein.

Lord v. Henderson, Action No. 17237, Finality of Judgment.

The Special Order in Case No. 17237, directing the payment of funds to plaintiff Lord was appealed from by the Appellees themselves as a "special order made after final judgment," under the provisions of California Code of Civil Procedure, Section 963(2). They cannot now dispute this fact.

Upon such appeal the District Court of Appeal reversed this Order and directed the Superior Court to issue an Order of opposite effect. Under the authorities heretofore cited in Appellants' Statement as to Jurisdiction, this decision of the District Court of Appeal is final and no longer subject to review in any state court.

In determining the finality of a judgment or decree for purposes of review by the United States Supreme Court, the test is "whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court."

Dept. of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254;

Richfield Oil Co. v. State Bd. of Equalization, 329 U. S. 69, 72, 91 L. Ed. 80.

Where a state Appellate Court directs a lower state court to enter a specified judgment or decree and leaves no judicial discretion to the lower court, the final decree, for purpopes of review by the United States Supreme Court, is not the decree entered by the inferior state

court upon receipt of the remittitur, but the order of the Appellate Court directing the entry of the specified judgment or decree.

> *Dept. of Banking v. Pink*, 317 U. S. 264, 268, 87 L. Ed. 254;
>
> *Cole v. Violette*, 319 U. S. 581, 87 L. Ed. 1599.

Furthermore, counsel for Appellees argue in Statement Opposing Jurisdiction:

> "The execution of said Order has been stayed by the District Court of Appeal in *Lord v. Henderson*, Action No. 17238."

This is not the fact. The Order Allowing Appeal and Stay of Execution in this case (Appendix A attached hereto):

> "that said . . . Order in Second Civil No. 17237 concerning the special fund therein be suspended and stayed in all respects until final determination thereof (this appeal)."

It further orders on the same page:

> "that no security be required for the maintenance of the special fund under the Order in Second Civil No. 17237."

Lord v. Henderson, Action No. 17238.

Appellees contend that this case is already decided adversely by this court in the cases of *Clark v. Paul Grey, Inc.*, 306 U. S. 583, and *Morf v. Bingaman*, 298 U. S. 407. These cases and the inapplicability of their facts to this case are thoroughly distinguished and analyzed in Appellants' Statement as to Jurisdiction, which Appellants emphasize as their answer here.

Roy Dial v. Henderson, Action No. 17239; Utility Trailer Sales Co. v. Henderson, Action No. 17340.

In reply to Appellee's assertion that the validity of the statute in question as to these plaintiffs has already been decided and foreclosed by previous decisions of this Court, it should suffice to observe that none of the cases cited for such proposition were concerned with any statute even remotely similar to the California "Caravan Act," nor were the statutes involved in any of these cases attacked upon the particular grounds urged herein. It is submitted therefor, that any supposed analogy in principle or reasoning between these cases and the questions raised in the instant controversy may be urged only after consideration of the full record herein on appeal as provided by Section 1257 of Title 28, United States Code.

ARGUMENT.

I.

The "Facts" Recited in the Opinion by the District Court of Appeal Are Not Determinative of the Issue in These Cases.

The position that the questions raised by the instant controversy must be decided upon the basis of evidence introduced and stipulated to in the case of *Clark v. Paul Grey, Inc.*, 306 U. S. 583, has, as pointed out above, already been adequately met in Appellants' Statement on Jurisdiction heretofore filed herein, and it is apparent that the points set forth under "Argument" in Appellee's Statement and Motion add nothing calling for reply insofar as they merely constitute lengthy quotations from the Opinion in the *Clark* case and that of the District Court of Appeal herein appealed from.

Throughout each and all of these points however there appears an additional and somewhat different attempt to cause decision of this case upon the basis of various argumentative recitals and conclusions from the Opinion of the District Court of Appeal herein, the greatest part of which do not even pretend to be founded upon any actual evidence whatsoever. As authority for this proposition Appellees cite the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, to the effect that findings of fact by a state court are binding upon the Supreme Court of the United States on appeal. Among the many objections to this line of reasoning Appellants respectfully call attention to the following:

A. Because the Statute in Question Is Unconstitutional Irrespective Thereof.

First, even taking these so-called "facts" recited in the Opinion of the District Court of Appeal at their face value, it is Appellants' position that the California Caravan Act must still be held unconstitutional as in contravention of the Interstate Commerce and Due Process Clauses of the United States Constitution. Among the many authorities, which it is desired to consider more fully in a proper brief to be filed herein, Appellants rely on the following:

Sprout v. South Bend, 277 U. S. 163;

Interstate Transit v. Lindsay, 283 U. S. 183;

Engels v. Morf, 300 U. S. 90;

Clark v. Paul Grey, Inc., 306 U. S. 583;

McCarroll v. Dixie Greyhound Lines, 309 U. S. 176;

Brimmer v. Rebman, 138 U. S. 78;

Dean Milk Co. v. Madison, 340 U. S. 347;

Smith v. Cahoon, 283 U. S. 553;

Liggett Co. v. Lee, 288 U. S. 517.

B. Because It Is the Duty of the Supreme Court to Determine for Itself Whether the Facts Found by the Trial Court Justify the Decision.

Secondly, the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, relied on by Appellees to foreclose consideration of the District Court of Appeal herein was a case where the highest state court had affirmed findings of fact by the trial court. In the instant case it is evident from a reading of the Opinion that the State Appellate

Court did not purport to make any findings of fact whatsoever, but merely recited admitted preliminary facts concerning the nature of plaintiffs' business, and then completely ignored the trial court's specific findings of fact with such statements as "In the instant case there was an abundance of testimony which the trial court was not privileged to disbelieve, which would have warranted the Legislature in finding the facts directly contrary to the facts as found by the Court.", and numerous declarations that the trial court's findings were "beyond the judicial province" or "of no materiality to the solution of the questions before us." Indeed, in the case of plaintiff Dial the Opinion of the District Court of Appeal merely states that 'the operation of Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan," and "quite apart from these differences of fact it is obvious that the State may impose the Caravan Tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper." Concerning the amount of the tax involved, which is one of the principal issues raised by the pleadings, the Opinion of the District Court of Appeal did not dispute the correctness of the trial court's findings thereon but rather declares that irrespective thereof the amount involved was reasonable in the light of certain speculations as to the cost of construction of the state's highways and other such factors.

In such a case, where the Appellate Court does not make definite findings of fact itself, it is the duty of the

Supreme Court to determine for itself whether the facts found *by the trial court* justify the decision therein and, if so, whether there was substantial evidence to support these findings.

> *Jones National Bank v. Yates*, 240 U. S. 541, 552, 553.

C. Because, in Any Event, the Supreme Court Will Review Findings of Fact Where Necessary to Pass on a Federal Question.

Thirdly, even were we to consider these recitals in the Opinion of the District Court of Appeal as in the nature of "findings" it is now settled law that the Supreme Court of the United States will review the findings of fact by a state court where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it.

> *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261,

or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question to analyze the facts.

> *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591.

For a collection of cases establishing these propositions as the general rule, see:

> *Robertson & Kirkham Jurisdiction of the Supreme Court of the United States* (1951 Ed.), Section 108, page 199, Footnote 6.

II.

If the Statute in Question Is Unconstitutional as Applied to Any of the Plaintiffs It Must Be Held Totally Invalid as to All.

It is evident from a reading of the comprehensive provisions of the California Caravan Act that if it be held unconstitutional to impose an operational tax on those who drive single vehicles with intent to sell, such as plaintiff Dial, or on those who tow trailers with intent to sell, such as the plaintiffs Utility Trailer Sales Co., *et al.*, then there would be left no criteria whatsoever by which to impose the tax on plaintiff Lord or other persons using the highway.

Smith v. Cahoon, 283 U. S. 563.

Appellees' motion to dismiss should be denied.

Respectfully submitted,

WARREN E. LIBBY,
Attorney for Appellants.

APPENDIX "A."

Order Allowing Appeal and Stay of Judgment.

The plaintiffs-appellants above-named having duly made and filed their Petition for Allowance of Appeal to the Supreme Court of the United States from the final Judgment and Decree of this Court herein entered on July 16, 1951, and applied for a stay thereof pending final determination of said appeal, and having presented their Assignment of Errors and prayer for reversal, and their Statement of Jurisdiction of the Supreme Court of the United States on appeal from this Court pursuant to pertinent Statutes of the United States and the Rules of said Supreme Court in such cases made and provided,

Now Therefore, It Is Hereby Ordered that the said appeal be and the same is hereby allowed as prayed, and that said Judgment and Decree and the Order is Second Civil No. 17237 concerning the special fund therein be suspended and stayed in all respects until final determination thereof.

It Is Further Ordered that the undertaking as security for costs on appeal be and the same is hereby fixed in the amount of $250., and the undertaking as security for the stay of said Judgment and Decree be and the same is hereby fixed in the amount of $3,000., both to be given with good and sufficient surety and conditioned as may be required by law and the discretion of this Court and that no security be required for the maintenance of the special fund under the order in Second Civil No. 17237.

It Is Further Ordered that Citation shall issue to defendants and appellees in accordance with law.

.....

Presiding Justice.

pellee. Reported below: 171 Kan. 497, 235 P. 2d 706.

No. 557. LORD ET AL. *v.* HENDERSON, DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT, ET AL. Appeal from the District Court of Appeal of California, Second Appellate District. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Warren E. Libby* for appellants. *Edmund G. Brown*, Attorney General of California, and *Frank W. Richards*, Deputy Attorney General, for appellees. Reported below: 105 Cal. App. 2d 426, 234 P. 2d 197.